TRANSCRIPT

OF

RECORD

(22,740.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 664.

THE UNITED STATES OF AMERICA AT THE RELATION AND TO THE USE OF ROBERT D. KINNEY, PLAINTIFF-IN-ERROR,

vs.

THE UNITED STATES FIDELITY AND GUARANTY COMPANY.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 29, 1911.

IN THE

Circuit Court of the United States

IN AND FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

October Sessions, 1909. No. 892.

IN ASSUMPSIT.

THE UNITED STATES OF AMERICA, AT THE RELATION AND TO THE USE OF ROBERT D. KINNEY,
Plaintiffs,

v.

THE UNITED STATES FIDELITY & GUARANTY COMPANY, A CORPORATION,
Defendant.

DOCKET ENTRIES.

October Session, 1909.

Assumpsit.

Robert D. Kinney	The United States of America at the relation and to the use of Robert D. Kinney, a citizen of the State of Pennsylvania and of the United States.
892	*v.*
Bayard Henry	The United States Fidelity and Guaranty Company, a corporation of the State of Maryland doing business in the State of Pennsylvania.

February	17, 1910.	Praepice for Summons filed. Summons exit returnable the first Monday of March next.
"	28, "	Statement of Claim filed.
March	1, 1910.	Order for the Appearance of Bayard Henry, Esquire, for defendant filed.
"	7, "	Summons returned "served" and filed.
"	15, "	Motion for rule to show cause why additional time should not be allowed to file affidavit of defense filed. Order granting rule to show cause why additional time should not be allowed for filing affidavit of defense. Returnable Friday, March 18. All proceedings to stay meanwhile.
"	16, "	Plaintiff's answer to rule to show cause why additional time should not be allowed for filing affidavit of defense filed. Amendment to plaintiff's statement of claim filed.
"	18, "	Order extending time to file affidavit of defense until April 2, 1910, inclusive, filed.
"	31, "	Affidavit of defense filed.
April	11, 1910.	Motion for judgment for want of a sufficient affidavit of defense filed.
May	6, 1910.	Argued.
June	1, 1910.	Opinion, McPherson, J., discharging rule for want of a sufficient affidavit of defence filed.

June	8, 1910.	Plaintiff's exception to refusal of the Court to decide the issue of law raised by motion for judgment for want of a sufficient affidavit of defence filed.
July	19, 1910.	Rule to plead filed.
"	25, "	Plea filed.
"	29, "	Order to place case on trial list filed.
August	10, 1910.	Rule to take depositions of Francis C. Lowell at Boston, Massachusetts, filed.
"	22, "	Rule to take depositions of Francis C. Lowell at Boston, Massachusetts, filed.
September	8, 1910.	Deposition of Francis C. Lowell filed.
October	18, 1910.	Replication filed.
"	20, "	Motion for judgment before jury sworn filed. And now, to wit, a jury being called come, to wit (see minutes). And the jury aforesaid upon their oaths and affirmations respectively do say that they find for defendant.
"	21, "	Exceptions to the charge to the jury filed.
"	24, "	Plaintiff's motion for new trial filed.
November	11, 1910.	Argued.
December	1, 1910.	Opinion, McPherson, J., refusing motion for new trial filed.
January	4, 1911.	Praepice for judgment filed. Judgment accordingly.
"	6, "	Defendant's Bill of Costs filed.

January	13, 1911.	Petition for Writ of Error filed. Assignments of Error filed. Order allowing petition for writ of error filed.
"	30, "	The sum of One Hundred Dollars deposited in the Registry of the Court by Robert D. Kinney as security for costs sur writ of error.
"	31, "	Citation allowed and issued. Writ of error allowed and copy thereof lodged in Clerk's office for adverse party.
February	2, "	Citation returned service accepted and filed. Praepice for transcript of record sur writ of error filed.

WRIT OF ERROR.

UNITED STATES OF AMERICA, *ss.*

THE PRESIDENT OF THE UNITED STATES.

To the Honorable the Judge of the Circuit Court of the United States for the Eastern Distict of Pennsylvania.

GREETING:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, or some of you between The United States of America at the relation and to the use of Robert D. Kinney, plaintiff, and The United States Fidelity and Guaranty Company, defendant a manifest error hath happened, to the great damage of the said Robert D. Kinney, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy

justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Third Circuit together with this writ, so that you have the same at the City of Philadelphia within thirty days, in the said United States Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the (Seal) United States, at Philadelphia, the 31st day of January in the year of our Lord one thousand nine hundred and eleven.

GEORGE BRODBECK,
Deputy Clerk of the Circuit Court of the United States.

Before McPHERSON, *J.*

Allowed by the Court.

Attest:

GEORGE BRODBECK,
Deputy Clerk.

PLAINTIFFS' STATEMENT OF CLAIM.
(As amended March 16, 1910.)

EASTERN DISTRICT OF PENNSYLVANIA:

The plaintiffs, the United States of America, at the relation and to the use of Robert D. Kinney,

claims of the defendant The United States Fidelity & Guaranty Company, the sum of nineteen thousand one hundred and forty-one dollars and ten cents ($19,141.10), with interest thereon from the 31st day of January, 1910, which is justly due and payable by the defendant to the plaintiffs, for the use of the relator aforesaid, upon the cause of action whereof the following is a statement.

1. That the relator, Robert D. Kinney, at the time of the happenings of the several matters hereinafter set forth, was and still is a citizen of the United States and an inhabitant and resident of the State of Pennsylvania and of the Eastern Judicial District thereof; and that the defendant, The United States Fidelity & Guaranty Company was during the same period of time aforesaid, as it still is, a corporation organized and existing under and by virtue of the laws of the State of Maryland, for the purpose, among other things, of guaranteeing the fidelity of persons holding positions of public and private trust, and to execute bonds and undertakings for such persons, and at the time of the execution and delivery of the hereinafter mentioned bond and writing obligatory, had complied with the provisions of the law of the State of Massachusetts authorizing it to do business in said State of Massachusetts, and had complied with the provisions of an Act of Congress, approved August 13, 1894, and had been duly granted by the Attorney General of the United States authority as under the laws provided to do business under said Act in the State and judicial district of Massachusetts, and the said defendant Company also has complied with the provisions of the laws of the State of Pennsylvania, authorizing it do business therein, and it now and for many years hitherto has been and is doing business in said State of Pennsylvania, and for that purpose have

managers and agents located in the City of Philadelphia in the Eastern Judicial District of Pennsylvania, to wit, J. Walter Zebley and Henry Strouse, trading as Zebley & Strouse.

2. That on the 28th day of April, 1909, one Charles K. Darling was duly appointed clerk of the Circuit Court of the United States within and for the judicial district of Massachusetts aforesaid and on or about that date was duly required to and did execute with sufficient surety, and cause to be delivered to these plaintiffs a bond to these plaintiffs in the penal sum of twenty thousand dollars ($20,000.00), conditioned among other things that he, the said Charles K. Darling, by himself and by his deputies, should faithfully discharge the duties of his office, and seasonably record the decrees, judgments and terminations of the said Court, as required by law; and thereupon, to wit, on the 28th day of June, 1909, the said Charles K. Darling, as principal, and the said The United States Fidelity & Guaranty Company, as surety, did make, execute and deliver to these plaintiffs, pursuant to the laws in such case made and provided, their certain bond and writing obligatory, in words and figures, following, to wit:

> "Know all men by these presents: That we, Charles K. Darling, of Concord, Mass., as principal, and The United States Fidelity & Guaranty Company a corporation created and existing under the laws of the State of Maryland, as surety, are held and firmly bound unto the United States of America in the full and just sum of twenty (20) thousand dollars, lawful money of the United States, to be paid to the United States; for which payment, well and truly to be made, the said Charles K. Darling binds himself, his heirs, executors, and administrators, and the said The United States Fidelity & Guaranty Company

binds itself, its successors and assigns, firmly by these presents.

"In witness whereof, the said Charles K. Darling, as principal, has hereunto set his hand and seal and the said The United States Fidelity & Guaranty Company, as surety, has caused these presents to be sealed with its corporate seal and signed by James P. Parker and F. M. Babson, its true and lawful attorney, thereunto duly authorized this 28th day of June, in the year one thousand nine hundred and nine.

"The condition of the foregoing obligation is such, That whereas, pursuant to law, the said Charles K. Darling has been appointed clerk of the Circuit Court of the United States for the District of Massachusetts, to have and to hold the same, with all the rights, privileges, and emoluments thereunto lawfully appertaining, as by an appointment to him bearing date the 28th day of April, 1909, more fully appears, a certified copy of which is hereunto annexed.

"Now, therefore, If the said Charles K. Darling by himself and by his deputies, shall faithfully discharge the duties of his office, and seasonably record the decrees, judgments, and determinations of the said court, and properly account for all moneys coming into his hands, as required by law, then this obligation to be void; otherwise, to remain in full force and virtue.

Signed, sealed, and
delivered in the
presence of:
"John E. Gilman, Jr. Chas. K. Darling (Seal)
"Principal.
"Francis M. Fogarty.
"(As to Principal.)
"The United States Fidelity
"& Guaranty Company.
"Surety.
"By James P. Parker &
"F. M. Babson,
"True and Lawful Attorneys.
"Wm. L. Burt. (Seal)."
"O. H. Osort.
"(As to Surety.)

which said bond was duly, to wit, on the 1st day of July, 1909, approved.

3. That thereafter, on the 1st day of July, 1909, the said bond and writing obligatory, so executed and delivered to the plaintiffs, was duly presented to and approved by the Circuit Court of the United States for the District of Massachusetts and recorded at large upon the records thereof and the original was deposited for safe keeping in the Department of Justice, at Washington, D. C., where the same now remains in the custody and files of the Attorney General of the United States.

4. That thereafter, the said Charles K. Darling, pursuant to said appointment and under and pursuant to and because of the security afforded by the said bond, and the approval thereof, was duly administered and took upon himself the oath appertaining to said office of clerk and thereupon entered upon the duties of his said office and position and from thence hitherto has continued to occupy and fill said office and position as clerk aforesaid, and receives the emoluments thereof under the law as he still continues so to do.

5. The plaintiffs allege that the said Charles K. Darling did not faithfully discharge all the duties of his said office of clerk of the Circuit Court of the United States in and for the District of Massachusetts, and for assigning a breach thereof, and of the condition of the said bond and writing obligatory, the plaintiffs allege that after his appointment as clerk of said court, and at divers times hereinafter mentioned, during all of which times the said Charles K. Darling was in office, as aforesaid, filling and occupying the position of clerk of court, as aforesaid, the relator, acting for himself in his own right and name and in his own be-

half as a plaintiff before said Circuit Court, on or about the 14th day of October, 1909, purchased and had duly issued out of said clerk's office a certain writ of Summons and Attachment, called trustee process, in the manner and form prescribed by law and made returnable to the first Monday of December then next ensuing, in an action of contract against the Plymouth Rock Squab Company (a corporation created and existing under and by virtue of the laws of the State of Maine, and which then and for many years prior thereto was doing business in the State of Massachusetts with its principal office located in the City of Boston, and its corporation officers residing and being inhabitants of said State of Massachusetts), as the defendant and alleging therein that The International Trust Company (a corporation located and doing business in the City of Boston), to be a trustee of the said defendant and entrusted with goods, effects and credits belonging to said defendant to the value of, to wit, eighteen thousand five hundred dollars, and commanding the Marshal of said District to attach the same and summon the said International Trust Company to appear before the Justices of said Circuit Court, to show cause, if any it has, why execution to be issued upon such judgment as the plaintiff therein may recover against the said defendant in said action (if any) should not issue against its goods, effects, or credits, in the hands and possession of it the said International Trust Company; which said process was duly placed in the hands of the Marshal of said District for execution, and such proceedings was thereupon had that afterwards said Marshal made return of due service thereof according to law, first on the said trustee, and afterwards on the said defendant, on the 26th day of October, 1909 (together with a service in the case of the defendant of a copy of plaintiff's declaration in said action); as by said writ and the Marshal's

endorsement of service thereon returned to and delivered into the official hands of said Charles K. Darling, clerk of court aforesaid, on or about the 26th day of October, 1909, and now remaining in his official custody as clerk of court aforesaid, reference being thereunto had wilfully and at large appear. A true and correct copy of said process and endorsement of the Marshal's return thereon is hereto annexed, marked "Exhibit No. 1," and is made part hereof.

6. That afterwards, on the 30th day of November, 1909, the relator acting for himself as the plaintiff aforesaid in said action, he having previously deposited and filed his declaration in said action with said Charles K. Darling, clerk of court aforesaid, by his praecipe in writing and directed to the Clerk of said Circuit Court and delivered to and received by said Charles K. Darling, officially, as clerk aforesaid, requested and directed, pursuant to the law and the practice in such case made and provided, that said action be entered of record in said Clerk's Office as a cause in said Court depending; as by said praecipe now remaining in the official custody of said Charles K. Darling, clerk aforesaid, reference being thereunto had will more fully and at large appear. A true and correct copy of said praecipe directing the entry of said action as aforesaid is hereto annexed, marked "Exhibit No. 2," and is made part hereof.

7. That afterwards, on the 20th day of December, 1909, the aforementioned International Trust Company, trustee in said action named, then having failed and neglected to file its appearance and answer in said action within the time allowed by law for its so doing, as by law and the mandate of said process of Court required, the relator as the plaintiff aforesaid in said action, by his praecipe in writing and directed to the clerk of court aforesaid and delivered to and received

by said Charles K. Darling, clerk of court aforesaid, requested and directed that judgment by default adjudging said International Trust Company a trustee of the Plymouth Rock Squab Company, defendant aforesaid, be entered of record in said cause against said International Trust Company, pursuant to the law and the practice in such case made and provided; as by said praepice now remaining in the official custody of said Charles K. Darling, clerk of court aforesaid, reference being thereunto had will more fully and at large appear. A true and correct copy of said praecipe is hereto annexed, marked "Exhibit No. 3," and is made part hereof.

8. That afterwards, on the said 20th day of December, 1909, the aforesaid Plymouth Rock Squab Company, the defendant in said action, then having failed and neglected to file its appearance in said action within the time allowed by law for its so doing, and as by law and the mandate of the aforesaid process of court in said cause required the relator as the plaintiff in said action by his praecipe in writing and directed to the clerk of court aforesaid, and which was delivered to and received by said Charles K. Darling, officially as clerk aforesaid, requested and directed that the said defendants default in not entering and filing its appearance in said action be recorded therein, pursuant to the law and the practice in such case made and provided; as by said praecipe now remaining in the official custody of said Charles K. Darling, clerk of court aforesaid, reference being thereunto had will more fully and at large appear. A true and correct copy of said praecipe is hereto annexed, marked "Exhibit No. 4," and is made part hereof.

9. That afterwards, on the 27th day of December, 1909, the relator as the plaintiff in said cause aforesaid, acting in pursuance of the law and the practice

in such case provided, by his motion presented in writing to and received by said Charles K. Darling, clerk of court aforesaid, moved and directed that judgment be entered for the plaintiff in said cause against the Plymouth Rock Squab Company defendant therein, upon its default in not appearing in said action, as previously noted on the record thereof as hereinbefore, in paragraph 8 mentioned, the clerk of court to assess the plaintiff's damages; and for the purpose of enabling the clerk to conveniently make such assessment the relator appended to said written motion paper a computation and form wherein the damages are set forth in the sum of $19,026.98, the bill of particulars embodied in the plaintiff's declaration filed in said case being all that was necessary for enabling the clerk to make up and enter said judgment and complete the record of said case; as by said motion and computation in writing now remaining in the official custody of said Charles K. Darling, Clerk aforesaid, reference being thereunto had will more fully and at large appear. A true and correct copy of said motion paper for judgment and assessment of damages is hereto annexed, marked "Exhibit No. 5," and is made part hereof.

10. That afterwards, on the 30th day of December, 1909, the relator, as plaintiff in said action, by his praecipe in writing and directed to the clerk of court aforesaid and delivered to and received by said Charles K. Darling officially as such clerk, requested and directed that process of execution be issued in said case on said judgment against the Plymouth Rock Squab Company (which judgment then remained as still it does in full force and effect, not vacated, set aside nor removed by writ of error), said process to be issued as aforesaid against the goods, effects, and credits in the hands and possession of the Interna-

tional Trust Company (who had previously by the judgment of said court been lawfully adjudged the trustee of the said defendant as hereinbefore in paragraph 7 mentioned, and which judgment then remained and still remains in full force and effect, not vacated, set aside nor removed by process of error), the money to be made on said execution being set out in said praecipe in the sum of $19,026.98, with interest and costs to be added, but the said Charles K. Darling, clerk of court aforesaid, his duties in the premises disregarding and in violation of the conditions of his aforesaid official bond, wholly refused and neglected and still refuses and neglects to make out and issue the process of execution so applied for. A true and correct copy of said praecipe ordering the issue of execution is hereto annexed, marked "Exhibit No. 6," and is made part hereof.

11. The plaintiffs further allege that said Charles K. Darling, did not faithfully discharge all of the duties of his said office of clerk of the Circuit Court aforesaid, in respects other than hereinbefore set forth, and for assigning other breaches of his said duty, and of the condition of the said bond and writing obligatory in paragraph 2 herein set forth, the plaintiffs allege that the relator has hitherto at divers times applied to said Charles K. Darling in his official capacity as clerk of court aforesaid for a certified transcript of the Docket Entries in the hereinbefore mentioned action wherein he was and is the plaintiff and the Plymouth Rock Squab Company is the defendant and the International Trust Company is trustee, as in paragraph 5 herein mentioned and set forth, but the said Charles K. Darling, clerk of court aforesaid, his duties in the premises disregarding and in gross violation of the conditions of his aforesaid official bond falsely alleges and pretends that there is no such cause

or action on the dockets of said Circuit Court, and further alleges and pretends that no such action has ever been entered by the relator in said Clerk's Office; wherefore, and by reason thereof the plaintiffs have been unable to obtain for purposes of incorporating in this statement any copies of docket entries or of records of the hereinbefore mentioned proceedings which were actually had by the relator before said Circuit Court as is hereinbefore detailed and set forth, other than those already hereto annexed and made part hereof.

12. Plaintiffs allege that the said Charles K. Darling, clerk of court aforesaid, is now and always hitherto has been fully indemnified and secured for the payment by the relator of his lawful fees in the premises without exception, that said security is in the form of cash actually deposited with and received by said Charles K. Darling, clerk aforesaid, for that purpose and in amounts that have been fully satisfactory to said Darling and fully sufficient for the purpose for which it has been deposited.

13. Plaintiffs set out and make part hereof the following recited provisions of the law of the State of Massachusetts, as existing and in full force and effect in said Commonwealth for governing the practice, pleadings, and forms and modes of proceedings in like causes as that of the relators hereinbefore set forth and during its pendency as detailed in the foregoing paragraphs, to wit:

(*a*)

"Section 19. Writs and processes in the Supreme Judicial Court and in the Superior Court shall be signed, and may be issued, by the clerk, * * * may run, and shall be executed and obeyed throughout the Commonwealth." (Revised Laws, Chapter 167.)

(*b*)

"Sec. 24. The first Monday of every month shall be a return day in every county for writs, processes, notices to appear and citations in all actions, suits and other civil proceedings in the Supreme Judicial Court and the Superior Court. Such writs, notices and citations and processes may be made returnable, at the election of the party who takes out the same, at any return day within three months after date thereof; but said court may make them returnable at other times." (Chap. 167.)

(*c*)

"Sec. 10. The declaration, * * * may be filed in the clerk's office * * * on or before the return day of the writ * * *." (Chap. 173.)

(*d*)

"Sec. 11. If the plaintiff fails to enter his writ, * * * in the clerk's office on or before the return day of the writ, * * * the action may at any time, upon motion of the defendant, be dismissed with costs; but courts, * * * may upon terms allow the plaintiff, at any time before the next regular return day, to enter his writ and to file his declaration." (Chap. 173.)

(*e*)

"Sec. 1. All personal actions, except actions for tort for malicious prosecution, for slander or libel or for assault and battery and actions of replevin, may be commenced by the trustee process, and any person or corporation may be summoned as trustee of the defendant therein * * *." (Chap. 189.)

(*f*)

"Sec. 9. A person who is summoned as trustee in the Supreme Judicial Court or the Superior Court shall appear and file his answer within ten days, * * * after the return day of the writ, un-

less further time is allowed by the Court or Justice. The answer shall disclose plainly, fully and particularly what goods, effect or credits, if any, of the defendant were in the hands or possession of the trustee when the writ was served upon him." (Chap. 189.)

(*g*)

"Sec. 17. A person who, being duly summoned as a trustee, neglects to appear and answer as hereinbefore provided shall be defaulted and adjudged a trustee." (Chap. 189.)

(*h*)

"Sec. 39. If a person is adjudged a trustee, it shall not be necessary to specify in the judgment the amount for which he is chargeable." (Chap. 189.)

(*i*)

"The entry of the judgment (charging trustees in the Superior Court) by the clerk without a special order of the court was in accordance with the statutes, and the rule of the court which requires the entry of judgments under the general order of the court at stated times in all cases which are ripe for judgment." (Decision of the Supreme Judicial Court on writ of error in the case of Rothchild *v.* Knight, 176 Mass. State Court Reports, 48-56.)

(*j*)

"Sec. 19. The goods, effects or credits of the defendant which have been entrusted to, or deposited in the hands or possession of, a person who is summoned as his trustee shall, * * * be attached and held to respond to the final judgment, as if they had been attached upon a original writ of attachment." (Chap. 189.)

(*k*)

"Sec. 40. If the goods, effects and credits in the hands of a person who is adjudged a trustee are not demanded of him by force of the execution within thirty days after final judgment, they shall

be liable to another attachment, whether made before or after the judgment; or if there has been no such second attachment, they may be recovered by the defendant." (Chap. 189.)

(*l*)

"Sec. 45. If a person who is adjudged a trustee does not, upon demand, pay over to the officer goods, effects or credits sufficient to satisfy the execution and if the execution is not otherwise satisfied, the plaintiff may sue out from the court in which the judgment was rendered a writ of *scire facias* against him or all, or a separate writ against each of the trustees, to show cause why judgment and execution should not be awarded against them or him and their or his own goods and estate for the amount remaining unsatisfied on the judgment against the defendant." (Chap. 189.)

(*m*)

"Sec. 1. There shall be only three divisions of personal actions: First. Contract, which shall include actions formerly known as assumpsit, covenant and debt, except actions for penalties."

(*n*)

"Sec. 15. Actions at law, * * * shall be commenced by original writs. Such writs * * * shall be framed either to summon the defendant, with or without an order to attach his goods or estate, * * * or in an action commenced by the trustee process, to attach his goods or estate in his own hands and also in the hands of the trustee." (Chap. 167.)

(*o*)

"Sec. 16. A separate summons shall be served on the defendant after an attachment of property on the writ, and the service thereof shall be a sufficient service of the original summons." (Chap. 167.)

(*p*)

"Sec. 17. In actions against corporations, and in other actions in which property may be attached, but in which the defendant is not liable to arrest, the writ of attachment and original summons may be combined in one, requiring the officer to attach the goods and estate and to summon the defendant." (Chap. 167.)

(*q*)

"Sec. 46. No writ, process, action, declaration or other proceedings in the courts or course of justice shall be abated, arrested, quashed or reversed for any circumstantial errors or mistakes if by it the person and case may be rightly understood by the court; or for defect or want of form only." (Chap. 173.)

(*r*)

"Sec. 54. If the defendant in an action commenced in the Supreme Judicial Court or the Superior Court, having been duly served with process, fails to enter an appearance in writing within ten days after the return day of the writ, his default shall be recorded, and after the expiration of four days from such default, the plaintiff may have judgment entered by order of court or by the clerk as of course without any further order. * * * Courts may, for good cause shown, extend the time for entering an appearance, and may, in their discretion and upon terms, take off a default at any time before judgment." (Chap. 173.)

(*s*)

"Sec. 1. Judgments in civil actions and proceedings in the Supreme Judicial Court shall be entered or motion, unless the court by general or special order otherwise orders. Judgments in civil actions and proceedings in the Superior Court which are ripe for judgment, shall unless the court by general or special order otherwise

orders, be entered by the clerk on the first Monday of each month, * * * unless the party entitled thereto otherwise requests in writing." (Chap. 177.)

(*t*)

"Sec. 5. In an action upon a promissory note or other contract in which the amount appears to be undisputed, the debt or damages may be assessed and ascertained by the clerk under a general order of the court or by a special reference of the case to him. The judgment in either case shall be entered in the same form as if it had been awarded by the court on an assessment or computation made by the court." (Chap. 177.)

(*u*)

"Sec. 16. No execution shall be issued within twenty-four hours after entry of judgment." (Chap. 177.)

(*v*)

"Sec. 23. All executions shall be made returnable within sixty days after their date." (Chap. 177.)

14. Plaintiffs show that the conditions of the said bond has been breached, as hereinbefore shown, to wit:—

(*a*) By the failure and refusal of said Charles K. Darling, clerk aforesaid, as shown in paragraph 10 herein, to make out, and issue the process of execution, as also shown by paragraph 10 and clauses (*k*), (*l*) and (*u*) of paragraph 13 he was authorized and in duty bound required to do.

(*b*) By the failure and refusal of said Charles K. Darling, clerk aforesaid, as shown in paragraph 11 herein, to enter on the record of said Circuit Court the entry of said action as a cause in said court depending, as also shown by paragraph 6 and clause (*d*) of

paragraph 13 he was authorized and in duty bound required to do.

(*c*) By the failure and refusal of said Charles K. Darling, clerk aforesaid, as shown in paragraph 11 herein, to enter on the record of said court judgment in said action charging the International Trust Company the trustee of the defendant, as also shown by paragraph 7 and clauses (*f*) and (*g*) of paragraph 13 he was authorized and in duty bound required to do.

(*d*) By the failure and refusal of said Charles K. Darling, clerk aforesaid, as shown in paragraph 11 herein, to enter on the record of said court the default of the defendant in not entering its appearance in said action, as also shown by paragraph 8 and clause (*r*) of paragraph 13 he was authorized and in duty bound required to do.

(*e*) By the failure and refusal of said Charles K. Darling, clerk aforesaid, as shown in paragraph 11 herein, to enter on the record of said court the judgment awarded for the relator as the plaintiff in said action against the defendant, as also shown by paragraph 9 and clause (*r*)of paragraph 13 he was authorized and in duty bound required to do.

(*f*) By the failure and refusal of said Charles K. Darling, clerk aforesaid, as shown in paragraph 11 herein, to assess the relators damages in said action, as also shown by paragraph 9 and clause (*r*) of paragraph 13 he was authorized and in duty bound required to do.

(*g*) By the failure and refusal of said Charles K. Darling, clerk aforesaid, as shown in paragraph 11 herein, to furnish the relator with the certified transcript of the docket entries requested of him, as in said paragraph 11 mentioned and set forth.

(*h*) By the wrongful conduct of said Charles K. Darling, clerk aforesaid, as shown in paragraph 11 herein, in his alleging and pretending that there is no such cause or action on the docket of said Circuit Court as that in said paragraph mentioned and referred to.

(*i*) By the wrongful conduct of said Charles K. Darling, clerk aforesaid, as shown in paragraph 11 herein, in his alleging and pretending that no action has ever been entered by the relator in said clerk's office, such as that in said paragraph 11 mentioned and referred to.

15. Plaintiffs show that by reason of the execution and delivery of the said bond and writing obligatory, the defendant The United States Fidelity & Guaranty Company as the surety therein, became liable to pay to plaintiffs the amount of money in damages to the relator hereinbefore set forth, to wit:—

Amount of the execution demand in said action, as shown in paragraph 10 of this declaration,.....	$19,026.98
Interest thereon from December 30, 1909, to January 31, 1910,.....	95.13
Plaintiffs taxable costs in said action..	18.89
Total amount or real debt in this action,	$19,141.10

for which sum of nineteen thousand one hundred and forth-one dollars and ten cents the plaintiffs demand judgment against the defendant The United States Fidelity & Guaranty Company, together with interest thereon from January 31, 1910, and costs.

(Signed) THE UNITED STATES OF AMERICA,
Plaintiffs.

By ROBT. D. KINNEY,
Pro se, Relator.

UNITED STATES OF AMERICA,
EASTERN DISTRICT OF PENNSYLVANIA, } *ss.:*

Robert D. Kinney, the relator in the foregoing statement named, being duly sworn on his oath deposes and says that the facts set forth in the foregoing statement as the basis of claim are true.

Sworn to and subscribed before me this 28th day of February, 1910. } (Signed) ROBT. D. KINNEY.

(Signed) THOMAS W. WILKINSON,
(Seal) *Notary Public.*
My commission expires January 18th, 1913.

EXHIBIT NO. 1.

UNITED STATES OF AMERICA.

MASSACHUSETTS DISTRICT, *ss.:*

THE PRESIDENT OF THE UNITED
(Seal of Court) STATES OF AMERICA.

To the Marshal of our District of Massachusetts or his Deputy, Greeting:

We command you to attach the goods and estate of Plymouth Rock Squab Company, a corporation of the State of Maine, with its principal place of business in the City of Boston, Massachusetts, District of Massachusetts aforesaid, to the value of eighteen thousand five hundred dollars, and summon the said Plymouth Rock Squab Company (if it may be found in your District) to appear before our Justices of our Circuit Court, next to be holden at Boston, within and for our District of Massachusetts, on the First Monday of December next; then and there, in our said Court, to answer unto Robert D. Kinney, of Philadelphia, State

of Pennsylvania, who is a citizen of said State of Pennsylvania, and of the United States. To the damage of the said Robert D. Kinney (as he says) the sum of $18,309.84/100 dollars, which shall then and there be made to appear, with other due damages. And whereas the said Robert D. Kinney says that the said Plymouth Rock Squab Company has not in its own hands possession, goods, and estate to the value of $18,309.84/100 dollars aforesaid, which can become at to be attached; but has entrusted to, and deposited in the hands and possession of The International Trust Company, Boston aforesaid trustee of the said Plymouth Rock Squab Company goods, effects, and credits, to the said value: We command you, therefore, that you summon the said The International Trust Company (if it may be found in your district) to appear before our Justices of our said Court, to be holden as aforesaid, to show cause, if any it has, why execution to be issued upon such judgment as the said Robert D. Kinney may recover against the said Plymouth Rock Squab Company in this action (if any) should not issue against its goods, effects, or credits, in the hands and possession of the said International Trust Company and have you there this Writ, with your doings therein.

Witness, the Honorable, Melville W. Fuller, Chief Justice at Boston, the Fourteenth day of October in the year of our Lord one thousand nine hundred and nine.

CHARLES K. DARLING,
Clerk.

(Endorsed: Robert D. Kinney, pltf. *v.* Plymouth Rock Squab Company, The International Trust Company, Defdt and Trustee. Circuit Court U. S. Mass. Dist, Feby. Term, 1909. Endorsed by Robt. D. Kinney, Pro se Plaintiff, No. 815 N. 42nd Street, Philadelphia, Pa.)

UNITED STATES OF AMERICA, MASSACHUSETTS, *ss.:* } Boston, October 26th, 1909.

Pursuant hereunto I have this day, at twelve o'clock and thirty minutes, P. M., delivered in the hands of John M. Graham, as he is President of The International Trust Company, 45 Milk Street, Boston, a true and attested copy of this writ. And afterwards on the same day I have delivered in the hands of Albert F. Wright, as he is President of the Plymouth Rock Squab Company, named in this writ, a true and attested copy of this writ at 1355 Washington Street, West Newton Massachusetts, together with a copy of the plaintiff's declaration, all by direction of Robert D. Kinney, Plaintiff.

JAMES D. RUHL,
Deputy U. S. Marshal.

Fees:	
Service	4.00
Expense	.94
Copies	.80
	$5.74

EXHIBIT NO. 2.

IN THE CIRCUIT COURT OF THE UNITED STATES IN AND FOR THE DISTRICT OF MASSACHUSETTS.

Robert D. Kinney, of Philadelphia, State of Pennsylvania, who is a citizen of said State of Pennsylvania, and of the United States, Plaintiff,

v.

Plymouth Rock Squab Company, a corporation of the State of Maine, with its principal place of business in the City of Boston, State of Massachusetts, Defendant.

Feby. Sess. 1909.
No.
Action of Contract.

Sur return of service of process made returnable to the First Monday in December, A. D. 1909, and filed in the Clerk's Office together with plaintiff's declaration therein.

To the Clerk of the above stated Court:

Enter the above entitled cause of record in your office, according to law.

(Signed) ROBT. D. KINNEY,
Pro se, Plaintiff.
November 30, 1909.

EXHIBIT NO. 3.

IN THE CIRCUIT COURT OF THE UNITED STATES IN AND FOR THE DISTRICT OF MASSACHUSETTS.

Robert D. Kinney, Plaintiff, *v.* Plymouth Rock Squab Company, Defendant. International Trust Company, Trustee.	February Term, 1909. No. Action of Contract.

To Charles K. Darling, Esq., Clerk of the above stated Court:

Enter judgment by default adjudging the International Trust Company, trustee of the defendant Plymouth Rock Squab Company, for want of its appearance and answer filed in the above entitled cause.

(Signed) ROBT. D. KINNEY,
Pro se, Plaintiff.
December 20, 1909.

EXHIBIT NO. 4.

IN THE CIRCUIT COURT OF THE UNITED STATES IN AND FOR THE DISTRICT OF MASSACHUSETTS.

Robert D. Kinney, Plaintiff, *v.* Plymouth Rock Squab Company, Defendant. International Trust Company, Trustee.	February Term, 1909. No. Action of Contract.

To Charles K. Darling, Esq., Clerk of the above stated Court:

Record the default of the defendant Plymouth Rock Squab Company in not having entered its appearance in the above entitled cause.

(Signed) ROBT. D. KINNEY,
Pro se, Plaintiff.
December 20, 1909.

EXHIBIT NO. 5.

IN THE CIRCUIT COURT OF THE UNITED STATES IN AND FOR THE DISTRICT OF MASSACHUSETTS.

Robert D. Kinney, Plaintiff, *v.* Plymouth Rock Squab Company, Defendant. International Trust Company, Trustee.	February Term, 1909. No. Action of Contract.

JUDGMENT AND ASSESSMENT OF DAMAGES.

And now, December 27th, 1909, on motion of Robert D. Kinney, *pro se,* plaintiff, judgment is entered for plaintiff against the above named defendant for default of appearance. The Clerk of Court to assess the plaintiff's damages.

To Charles K. Darling, Clerk of said Court:

Sir:—Assess the plaintiff's damages according to law.

(Signed) ROBT. D. KINNEY,
Pro se, Plaintiff.
December 27th, 1909.

The Clerk of Court assesses the plaintiff's damages as follows:

Amount of claim set out in declaration filed and for which judgment is therein demanded,.....	$18,309.84
Interest on same from May 2nd, 1909 to December 27, 1909,.....	717.14
	$19,026.98

The plaintiff's damages are therefore assessed at the sum of Nineteen thousand and twenty-six dollars and ninety-eight cents, and costs.

.....
Clerk, U. S. Circuit Court.
Dist. Massachusetts.

EXHIBIT NO. 6.

IN THE CIRCUIT COURT OF THE UNITED STATES IN AND FOR THE DISTRICT OF MASSACHUSETTS.

Robert D. Kinney, Plaintiff,
v.
Plymouth Rock Squab Company, Defendant.
International Trust Company, Trustee.

February Term, 1909.
No.
Action of Contract.

To the Clerk of the above stated Court:

Sir:—Issue execution in trustee process in the above stated cause, returnable according to law.

Real debt.....	$19,026.98
Upon surrender by or for account of the defendant of six notes of hand by the plaintiff, dated November 2, 1908, each in the principal sum of $200.00 with interest at six per centum, made payable to the defendant or order, credit the defendant therefor the sum	1,273.60
	$17,753.38

Add interest on the balance (or real debt) from December 30, 1909, and costs.

(Signed) ROBT. D. KINNEY,
Pro se, Plaintiff.
December 29, 1909.

AFFIDAVIT OF DEFENCE.

(Filed March 31, 1910.)

COMMONWEALTH OF PENNSYLVANIA,
COUNTY OF PHILADELPHIA, } *ss.:*

J. WALTER ZEBLEY, being duly sworn according to law, deposes and says that he is the Resident Vice-President of the United States Fidelity & Guaranty

Company of Baltimore, the above defendant. That he is duly authorized to make this defence, and that the said defendant has a just, true and complete defence to the whole of the plaintiff's claim, of the following nature:

Deponent is informed and believes and expects to be able to prove that the said Charles K. Darling has faithfully discharged all of the duties of his office as clerk of the Circuit Court of the United States for the District of Massachusetts.

Deponent admits that the plaintiff on or about October 14, 1909, obtained a writ from the office of the clerk of the United States Circuit Court for the District of Massachusetts in a certain action as set forth in plaintiff's statement, and that the plaintiff made said writ returnable to the first Monday of December, 1909, and said writ was returned by the Marshal, who filed it with said clerk on October 26th, 1909.

Deponent is informed and believes and expects to be able to prove that the first Monday of December was not a return day for law writs in the said Circuit Court, and that the next succeeding return day to which said writ could have been issued was the last Tuesday of February, 1910, or February 22nd. That the only return days in said Circuit Court are the first days of the terms of Court; that the terms of Court are the May and October terms, and that by Act of Congress approved May 14, 1902, it is provided that in the Circuit Court for the District of Massachusetts the May Term shall commence on the last Tuesday of February, and the October Term on the Third Tuesday of October.

Deponent is informed and believes and expects to be able to prove that the said writ and proceedings thereunder could not be entered upon the docket of said

Court by said Charles K. Darling, clerk of said court, until February 22nd or 23rd, 1910, except by agreement of parties or by a special order of the court, neither of which was obtained in the said action. That Rule 7 of the rules of said court provides as follows:

"APPEARANCES—ENTRY OF WRITS.

"1. Each writ, bill in equity or other proceeding entered, shall be accompanied with an appearence as provided in Rule 5, and shall be forthwith docketed in the order in which received by the clerk, with the name of the person appearing; but no entry shall be held effective, and no docketing shall be made, until such writ, bill or other proceeding is returned and on file, except by special order of the court or a judge thereof.

"2. All actions by writ shall be entered within the first two days of the return term and not afterwards, unless by agreement of the parties or by special order of the court or a judge, and, in the latter case, on such additional notice to the defendant or defendants as the court or judge may order, to be served by the marshal or his deputy and due return made thereof."

Deponent admits that on or about December 20th, 1909, and December 27th, 1909, plaintiff filed with said clerk motions or praecipe for judgment by default in said action, and that on December 30th, 1909, filed a praecipe for process of execution to be issued.

Deponent is informed and believes and expects to be able to prove that no judgment could be entered and no execution issued by said clerk in said action, and that both said praecipes were filed prior to the return day of said court, and prior to the day on which said case could be docketed.

Deponent is informed and believes and expects to

be able to prove that said Charles K. Darling in refusing to enter said case upon the docket, to enter judgment and issue execution thereon acted under advice and upon the instructions of the Hon. Judge Lowell of the said court; that the said refusals do not constitute a breach of the official duty of the said Charles K. Darling.

Deponent is informed and believes and expects to be able to prove that the said case was entered upon the docket of said court on February 23rd, 1910, in accordance with Rule 7, section 2, and that upon the following day an appearance was filed for the defendant. A copy of the docket entries of said case is annexed hereto and marked "Exhibit A."

Deponent denies that plaintiff has suffered any damage or loss by reason of any action or omission on the part of said Charles K. Darling.

Deponent is informed and believes and expects to be able to prove that plaintiff has never brought suit against said Charles K. Darling upon his official bond and has never recovered judgment against him; and deponent denies the right of the plaintiff to bring suit against this defendant upon the official bond of said Charles K. Darling without having first brought suit against said Darling or without joining Darling as a party to such suit.

(Signed) J. WALTER ZEBLEY.

Sworn to and subscribed
before me this 28th day of
March, A. D., 1910.

(Signed) FLORENCE GIGON,
(Seal) *Notary Public.*
Commission expires March 10, 1913.

EXHIBIT "A."

CIRCUIT COURT OF THE UNITED STATES, DISTRICT OF MASSACHUSETTS.

No. 679, Law Docket.

Robert D. Kinney

v.

Plymouth Rock Squab Company and Trustee.

ROBERT D. KINNEY, *pro se.* JOHN S. PATTON.

DOCKET ENTRIES.

February	23,	1910.	Writ filed and declaration filed, writ served by attachment and return of service by marshal entered.
"	"	"	Appearance of Robert D. Kinney, plaintiff, pro se, filed.
"	"	"	Amendment to plaintiff's declaration filed.
"	"	"	Plaintiff's affidavit to dispense with security for costs filed.
"	"	"	Trustee's answer of no effects filed.
"	24	"	Appearance of John S. Patton for defendant filed.

MOTION FOR JUDGMENT FOR WANT OF A SUFFICIENT AFFIDAVIT OF DEFENCE.

(Filed April 11, 1910.)

And now, April 11, 1910, comes the plaintiffs in the above entitled action and says that the defendant has filed of record therein its affidavit alleging its defence to the plaintiffs' claim which affidavit, the plaintiffs say, does not sufficiently set out or disclose any fact or thing that if proven to be true would constitute

a just and sufficient defence in law to the plaintiffs' claim or any part or portion thereof.

Wherefore the plaintiffs move the court for judgment against the defendant for want of a sufficient affidavit of defence.

By the use-plaintiff.

(Signed) ROBT. D. KINNEY,
Pro se.

OPINION, DISCHARGING RULE FOR JUDGMENT, ETC.

(Filed June 1, 1910.)

McPHERSON,
District Judge.

I do not think that a summary judgment should be entered on this record. The questions presented by the statement of claim and the affidavit of defence can only be satisfactorily determined after both sides have had an opportunity to offer such evidence as may be pertinent. No opinion is intimated now upon any question that was argued at the hearing of this motion.

The rule for judgment is discharged.

PLAINTIFFS' EXCEPTION TO REFUSAL OF COURT, ETC.

(Filed June 8, 1910.)

And now, June 8th, 1910, comes the plaintiffs in the above entitled action and excepts to the refusal of the Court to decide the issue of law raised by plaintiffs' motion for judgment for want of a sufficient affidavit of defence, to wit, whether the defendant has sufficiently

set out or disclosed any fact or thing in its affidavit filed that if proved to be true would constitute a just and sufficient defence in law to the plaintiffs' claim filed or to any part or portion thereof; said refusal being filed of record in writing reading as follows:

"McPherson,
"District Judge.
"I do not think that a summary judgment "should be entered on this record. The questions "presented by the statement of claim and the "affidavit of defence can only be satisfactorily de- "termined after both sides have had an oppor- "tunity to offer such evidence as may be perti- "nent. No opinion is intimated now upon any "question that was argued at the hearing of this "motion.
"The rule for judgment is discharged."

(Signed) ROBERT D. KINNEY,
Pro se, Use-Plaintiff.

(Signed) J. B. McPHERSON,
District Judge.

PLEA.

(Filed July 25, 1910.)

To Clerk of said Court:

Defendant pleads:
Non Assumpsit.
Payment.
Set-off.
Statute of Limitations.

BAYARD HENRY,
Attorney for Defendant.

PLAINTIFF'S REPLICATION.

(Filed October 18, 1910.)

The plaintiff for replication to the defendant's pleas fi'ed says.

Non solvit,

No set-off,

No statute of Limitations,

similiter and issue.

(Signed) ROBERT D. KINNEY,
Pro se, Relator.
Oct. 18, 1910.

MOTION FOR JUDGMENT BEFORE JURY SWORN.

(Filed October 20, 1910.)

And now, October 20th, 1910, before the jury is called and sworn in this case the plaintiff files its motion for judgment against the defendant for the reasons appearing by the record as follows:

First.—On the grounds that the defendant has admitted the material allegations of the statement of claim.

Second.—On the grounds that the material averments of a sufficient statement of claim are not denied.

Third.—On the grounds that the defendant has not set up new matter constituting a legal defence.

(Signed) ROBERT D. KINNEY,
Pro se, Relator.

EXTRACT FROM MINUTES OF OCTOBER 20, 1910.

United States to use of R. D. Kinney *v.* The United States Fidelity and Guaranty Company.	October Session, 1909. No. 892.

Before McPherson, *J.*

Mr. Kinney for use plaintiff.

Mr. Stokes for defendant.

JURY.

And now, to wit, a jury being called comes, to wit:

Theodore U. Griffith,	Frank S. Raesley,
Henry T. Gish,	Edwin F. Todd,
Thomas J. Rose,	Frank Yuengling,
Bernard J. Rountree,	James Rosenberger,
Louis P. G. Fegely,	Henry H. Bonnell,
William W. Sullivan,	Nathan A. Haas.

Motion by plaintiff for judgment against the defendant (before jury is sworn). Motion overruled. Exception noted for plaintiff by direction of the Court.

Jurors are duly sworn or affirmed to well and truly try the issue joined.

Mr. Kinney opens to jury for use plaintiff.

The plaintiff called no witnesses, giving only documentary evidence.

Plaintiff rests.

Mr. Stokes opens to jury for defendant.

Case re-opened for plaintiff and Mr. Kinney sworn.

Plaintiff closes.

The Court instructs jury to find for defendant.

VERDICT

And the jurors aforesaid upon their oaths and affirmations respectively do say that they find for defendant.

EXCEPTIONS TO THE CHARGE TO JURY

(Filed October 21, 1910.)

And now, October 20, 1910, before the jury leave the box, the plaintiff respectfully excepts to the charge of the learned Judge, as follows:

1. In refusing to answer the first point presented by the plaintiff, which point reads as follows:

> "If the jury finds from the evidence that the plaintiff's writ of summons, issued and served in his action in the United States Circuit Court at Boston, was made returnable to a return day established by the State Laws of Massachusetts, the verdict must be for the plaintiff."

2. In refusing to answer the second point presented by the plaintiff, which point reads as follows:

> "If the jury finds from the evidence that the plaintiff ordered the court clerk at Boston, by writing delivered to him on or before the return day named in the writ of summons, to enter the action on the docket of his office, the verdict must be for the plaintiff."

3. In refusing to answer the third point presented by the plaintiff, which point reads as follows:

> "If the jury finds from the evidence that the defendant in the Boston case had failed to enter his appearance in writing in clerk's office within ten days after the return day named in the writ, and the plaintiff in writing delivered to him ordered the court clerk to record such default and the clerk failed and neglected to do so, the verdict must be for the plaintiff."

4. In refusing to answer the fourth point presented by the plaintiff, which point reads as follows:

> "If the jury finds that the defendant in the Boston case had failed to enter his appearance in

the Boston case, and the plaintiff, on or after the expiration of fourteen days after the day named in the summons as the return day, ordered the court clerk in writing delivered to him, to enter judgment for the plaintiff and against the defendant for default of appearance, the verdict must be for the plaintiff."

5. In refusing to answer the fifth point presented by the plaintiff, which point reads as follows:

"If the jury finds that the plaintiff ordered the court clerk at Boston, in writing dlivered to him, to assess the plaintiff's damages in that case and he neglected and failed to do so, the verdict must be for the plaintiff."

6. In refusing to answer the sixth point presented by the plaintiff, which point reads as follows:

"If the jury finds that the plaintiff on or not later than January 25, 1910, had ordered the court clerk at Boston in writing delivered to him to issue execution in his case, and he neglected and failed to do so, the verdict must be for the plaintiff."

7. In refusing to answer the seventh point presented by the plaintiff, which point reads as follows:

"Under the whole evidence in the case the plaintiff is entitled to recover, and the verdict must be for the plaintiff."

8. In giving binding instructions to the jury to render its verdict for the defendant.

(Signed) J. B. McP.,
Trial Judge.

(Signed) ROBT. D. KINNEY,
Pro se, Relator.

OPINION, REFUSING MOTION FOR NEW TRIAL.

(Filed December 1, 1910.)

McPHERSON, *District Judge.*

This suit is upon the official bond of Charles K. Darling, clerk of the United States Circuit Court for the District of Massachusetts. The plaintiff puts his case upon what he avers to be the clerk's official misconduct in the following particulars:

> "(*a*) By the failure and refusal of said Charles K. Darling, clerk aforesaid, as shown in paragraph 10 herein, to make out and issue the process of execution, as also shown by paragraph 10 and clauses (k), (l) and (u) of paragraph 13 he was authorized and in duty bound required to do.
>
> (*b*) By the failure and refusal of said Charles K. Darling, clerk aforesaid, as shown in paragraph 11 herein, to enter on the record of said Circuit Court the entry of said action as a cause in said court depending, as also shown by paragraph 6 and clause (d) of paragraph 13 he was authorized and in duty bound required to do.
>
> (*c*) By failure and refusal of said Charles K. Darling, clerk aforesaid, as shown in paragraph 11 herein, to enter on the record of said court judgment in said action charging the International Trust Company, the trustee of the defendant, as also shown by paragraph 7 and clauses (f) and (g) of paragraph 13 he was authorized and in duty bound required to do.
>
> (*d*) By the failure and refusal of said Charles K. Darling, clerk aforesaid, as shown in paragraph 11 herein, to enter on the record of said court the default of the defendant in not entering its appearance in said action, as also shown by paragraph 8 and clause (r) of paragraph 13 he was authorized and in duty bound required to do.
>
> (*e*) By the failure and refusal of said Charles K. Darling, clerk aforesaid, as shown in paragraph 11 herein, to enter on the record of said court

the judgment awarded for the relator as the plaintiff in said action against the defendant, as also shown by paragraph 9 and clause (r) of paragraph 13 he was authorized and in duty bound required to do.

(*f*) By the failure and refusal of said Charles K. Darling, clerk aforesaid, as shown in paragraph 11 herein, to assess the relators damages in said action, as also shown by paragraph 9 and clause (r) of paragraph 13 he was authorized and in duty bound required to do.

(*g*) By the failure and refusal of said Charles K. Darling, clerk aforesaid, as shown in paragraph 11 herein, to furnish the relator with the certified transcript of the docket entries requested of him, as in said paragraph 11 mentioned and set forth.

(*h*) By the wrongful conduct of said Charles K. Darling, clerk aforesaid, as shown in paragraph 11 herein, in his alleging and pretending that there is no such cause or action on the dockets of said Circuit Court as that in said paragraph mentioned and referred to.

(*i*) By the wrongful conduct of said Charles K. Darling, clerk aforesaid, as shown in paragraph 11 herein, in his alleging and pretending that no action has ever been entered by the relator in said clerk's office, such as that in said paragraph 11 mentioned and referred to."

This quotation from the amended statement of claim sufficiently indicates the nature of the complaint. In a word, the situation is this: In the conduct of a civil suit before the Circuit Court in Massachusetts, brought against the Plymouth Rock Squab Co. as defendant, and the International Trust Co. as trustee (equivalent to garnishee in Pennsylvania practice), the plaintiff undertook to govern himself by what he believed to be the practice established by the laws of the State; while the clerk insisted that the suit must be governed by the rules of the Circuit Court, so far as these

rules differed from the State practice. As a result of this conflict, the plaintiff avers that he was injured, because the clerk refused to enter judgment against the Squab Co., and against the Trust Co.; and refused also to issue execution, whereby the plaintiff was prevented from obtaining satisfaction of his demand. There was no disputed fact at the trial before this court, and the jury was directed to find for the defendant. The correctness of this instruction is now to be considered.

The plaintiff's principal contention is that Section 914 of the Revised Statutes compelled the Circuit Court to follow closely the State practice in the matter of return days for the writ of summons. The federal practice differed, and it is clear that the clerk was obeying the rules of the Circuit Court upon this subject. If therefore these rules were valid he was justified in refusing to enter judgment and to issue execution. Many statutes of Massachusetts were offered in evidence at the trial, and the defendant's counsel contended then, and contends now, that the State practice concerning return days for the writ of summons substantially coincided with the federal practice about thirty years ago; that such conformity fully satisfied Section 914; and that although the State practice may have since been changed the federal court was not obliged to follow, citing in support of this position, *Shepard* v. *Adams,* 168 U. S. 618, and *Railroad Co.* v. *Cokey,* 210 U. S. 155. In my opinion these decisions sustain the defendant's contention, and require me to hold that the plaintiff's suit in the Circuit Court for the District of Massachusetts was properly subject to the rules of that court, and that the clerk was right in refusing to comply with the several motions referred to in the statement of claim.

But there is another ground for upholding the direction to the jury. The plaintiff failed to prove

that he had suffered any damage by reason of the clerk's refusal to enter judgment and issue execution. He offered no evidence that if he had obtained the desired judgment any money could have been collected by an execution; and especially—for this is the ground upon which the plaintiff chiefly alleges that he has been injured—there was no evidence that the Trust Co. held any money belonging to the Squab Co., or was in any manner or degree indebted to the Squab Co. so that the trustee process could have been made effective.

For either of these reasons it seems to me clear that the plaintiff was not entitled to recover.

A new trial is refused.

ORDER FOR ENTRY OF JUDGMENT.

(Filed January 4, 1911.)

To the Clerk of said Court:

The clerk will enter judgment on the verdict in above case in favor of the defendant and against the plaintiff.

BAYARD HENRY,
Attorney for Defendant.
January 4, 1911.

JUDGMENT.

Before McPherson, *J.*

And now, this fourth day of January, 1911, in accordance with præcipe filed, judgment is hereby entered on the verdict in the above case in favor of the defendant and against the plaintiff.

LEO A. LILLY,
Deputy Clerk.

ASSIGNMENTS OF ERROR.

(Filed January 13, 1911.)

The plaintiff herein, in connection with and as a part of its foregoing petition for a writ of error, makes the following assignments of error, which it avers were committed by the Court in the rendition of the judgment against this plaintiff, to the prejudice of the use-plaintiff, appearing upon the record herein, that is to say:

First.—The Court erred in discharging plaintiff's rule (motion) for judgment for want of a sufficient affidavit of defence.

Second.—The Court erred in not entering judgment against the defendant and in favor of the plaintiff, on plaintiff's motion therefor, for want of a sufficient affidavit of defence.

Third.—The Court erred in overruling plaintiff's motion (filed and made in open court on the calling of the case for jury trial and before the jury was called and sworn) for judgment against the defendant and in favor of the plaintiff, said motion having been based upon the following reasons appearing by defendant's purported affidavit of defence of record in the cause, to wit:

(1) On the grounds that the defendant has admitted the material allegations of the statement of claim.

(2) On the grounds that the material averments of a sufficient statement of claim are not denied.

(3) On the grounds that the defendant has not set up new matter constituting a legal defense.

Fourth.—The Court erred in its ruling made under the circumstances and in the manner, to wit, whereas at the trial the plaintiff offered in evidence, together as a whole, the plaintiff's statement of claim and the

defendant's affidavit of defence, said offer being restricted by its terms to those parts that served to obviate, in the judgment of the use-plaintiff, the necessity of the plaintiff submitting to the jury other or further proof for establishing the truth of the allegations of fact constituting plaintiff's cause of action, as the same were set out in said statement and then remaining on file and as of record in said cause; and whereas the trial Judge ruled in respect to said offer, that the statement of claim only was admitted in evidence and not the said affidavit of defence; and whereas the plaintiff then and there excepted to said ruling and was by said trial Judge allowed the same.

Fifth.—The Court erred in refusing and omitting to charge the jury on plaintiff's points, duly submitted and reading as follows:

> "1. If the jury finds from the evidence that the plaintiff's writ of summons, issued and served in his action in the United States Circuit Court at Boston, was made returnable to a return day established by the State Laws of Massachusetts, the verdict must be for the plaintiff."
>
> "2. If the jury finds from the evidence that the plaintiff ordered the court clerk at Boston, by writing, delivered to him on or before the return day named in the writ of summons, to enter the action on the docket of his office, the verdict must be for the plaintiff."
>
> "3. If the jury finds from the evidence that the defendant in the Boston case had failed to enter his appearance in writing in the clerk's office within ten days after the return day named in the writ, and the plaintiff, in writing, delivered to him, ordered the court clerk to record such default, and the clerk failed and neglected to do so, the verdict must be for the plaintiff."
>
> "4. If the jury finds that the defendant in the Boston case had failed to enter his appearance, and the plaintiff, on or after the expiration of fourteen

days after the day named in the summons as the return day, ordered the court clerk, in writing delivered to him, to enter judgment for the plaintiff and against the defendant for default of appearance, the verdict must be for the plaintiff."

"5. If the jury finds that the plaintiff ordered the court clerk at Boston, in writing delivered to him, to assess the plaintiff's damages in that case and he neglected and failed to do so, the verdict must be for the plaintiff."

"6. If the jury finds that the plaintiff on or not later than January 25th, 1910, had ordered the court clerk at Boston, in writing delivered to him, to issue execution in his case, and he neglected and failed to do so, the verdict must be for the plaintiff."

"7. Under the whole evidence in the case the plaintiff is entitled to recover, and the verdict must be for the plaintiff."

Sixth.—The Court erred in giving binding instructions to the jury to render its verdict for the defendant.

Seventh.—The Court erred in not instructing the jury to render its verdict for the plaintiff.

(Signed) ROBT. D. KINNEY,
Pro se, Use-Plaintiff.

PRAECIPE FOR TRANSCRIPT *SUR* WRIT OF ERROR.

(Filed February 2, 1911.)

To the Clerk of above stated Court:

You are hereby requested to take a transcript of record, to be filed in the United States Circuit Court of Appeals for the Third Circuit, pursuant to a writ of error allowed in the above entitled cause, and that you are to include in such transcript the following and no other matter, to wit:

(1) Docket Entries.

(2) Minutes of October 20, 1910.

(3) Statement of claim as amended.

(4) Affidavit of defence.

(5) Plaintiff's motion for judgment for want of a sufficient affidavit of defence.

(6) Order and opinion discharging motion for judgment for want of a sufficient affidavit of defence.

(7) Plaintiff's exception filed June 8, 1910.

(8) Defendant's plea filed.

(9) Plaintiff's replication filed.

(10) Plaintiff's motion for judgment of October 20, 1910, before jury sworn.

(11) Plaintiff's exception to the charge of the jury.

(12) Verdict of the jury.

(13) Judgment entered.

(14) Assignments of error.

(15) Opinion filed refusing new trial.

(16) Rule 9 on page 46, etc., of pamphlet entitled "Rules of the United States Circuit Court of Appeals and of the Circuit Courts of the United States for the First Circuit," comprising exhibit "A," annexed to the deposition of Francis C. Lowell, taken under rule of Court and filed September 8, 1910.

ROBERT D. KINNEY,
Pro Plaintiff in Error.
January 30, 1911.

Rule 9 on page 46, etc., of pamphlet entitled "Rules of the United States Circuit Court of Appeals and of the Circuit Courts of the United States for the First Circuit", comprising exhibit "A" annexed to the deposition of Francis C. Lowell taken under rule of court and filed September 8, 1910.

9.

STATE LAWS ADOPTED IN COMMON LAW CAUSES.

1. As authorized by Section 915 of the Revised Statutes, the court adopts in common law causes all State laws now, to wit, this second day of February. 1903, in force in the State constituting this district, in relation to attachments and other process, subject to the proviso contained in said section; and such laws so adopted include all remedies by attachment, or other process, against the property of defendants now, to wit, this second day of February, 1903, provided by the laws of said State, whether directly or by foreign attachment, trustee process or garnishment, or whether original or interlocutory.

2. As authorized by Section 916 of the Revised Statutes, the court adopts all State laws now, to wit, this second day of February, 1903, in force in the State constituting this district, in relation to remedies upon judgments in common law causes, by execution or otherwise, to reach the property of judgment debtors.

3. The forms of executions and other final process in all suits, whether at law or in equity, shall be the same as are now, to wit, this second day of February, 1903, used in the court, except in cases where the court or a judge thereof shall otherwise specially order; but under the authority of Section 918 of the Revised Statutes, the time for returning such executions and other final process shall be expressly set forth in the same,

and the same shall be returned in the same time, and *alias* and *pluries* executions shall issue in the same manner as now, to wit, this second day of February, 1903, required by the laws of the State constituting this district.

CLERK'S CERTIFICATE.

UNITED STATES OF AMERICA,
EASTERN DISTRICT OF PENNSYLVANIA, } *Sct.*

I, HENRY B. ROBB, Clerk of the Circuit Court of the United States of America for the Eastern District of Pennsylvania, in the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original pleas and proceedings in the case of the United States, *ex rel.* Robert D. Kinney *v.* United States Fidelity and Guaranty Company, No. 892, October Session, 1909, as per *praecipe* filed, a copy of which is hereto annexed, on file and now remaining among the records of the said Court in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the
(Seal) said Court at Philadelphia, this ninth day of February, in the year of our Lord one thousand nine hundred and eleven, and of the Independence of the United States the one hundred and thirty-fifth.

HENRY B. ROBB,
Clerk of C. C.

By GEORGE BRODBECK,
Deputy Clerk.

In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1911.

No. 1473.

UNITED STATES to the Use of ROBERT D. KINNEY, Plaintiff in Error,
vs.
UNITED STATES FIDELITY & GUARANTY Co., Defendant in Error.

And afterwards, to wit, on the seventeenth of March, 1911, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Hon. Joseph Buffington, and Hon. W. M. Lanning, Circuit Judges, and the Hon. J. S. Young, District Judge, and the Court not being fully advised in the premises, takes further time for the consideration thereof.

And afterwards, to wit, on the twelfth day of April, 1911, come the parties aforesaid by their counsel aforesaid, and the Court now being fully advised in the premises, renders the following decision:

In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1911.

No. 27.

UNITED STATES to the Use of ROBERT D. KINNEY
vs.
THE UNITED STATES FIDELITY & GUARANTY COMPANY.

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

Before Buffington and Lanning, Circuit Judges, and Young, District Judge.

BUFFINGTON, *J.*:

In the court below Robert D. Kinney, a citizen of Pennsylvania, brought suit against The United States Fidelity and Guaranty Company, a citizen of Maryland, surety upon a bond given to the United States by Charles K. Darling, Clerk of the United States Circuit Court for the District of Massachusetts. After the proofs by both parties were submited on the trial of the cause, the court below instructed the jury to find for the defendant. From such proofs it appears that Mr. Kinney, acting as his own counsel, brought suit in the Circuit Court for the District of Massachusetts against the Plymouth Rock Squab Company, as defendant, and the International Trust Company, as trustee or garnishee. After service of process Mr. Kinney sought to have a default judgment entered in accordance with the return days fixed by the Massachusetts state statutes for the courts of that state, while Mr. Darling, the clerk, contended the return days

fixed by the rules of the circuit court governed, and refused to enter judgment as directed by Mr. Kinney. In an opinion refusing a new trial and reported at — Fed. Rep., the court below justified its action in directing a verdict for the defendant on two grounds; first, because there was no proof Mr. Kinney was damaged, and secondly, that Mr. Darling was justified in following the rules of the circuit court as to return days. We have, as we have said, carefully examined the testimony, and are of opinion the court rightly held that Mr. Kinney's proofs did not show he had suffered damage by the clerk's action. There was no proof that there were any funds of the Plymouth Rock Squab Company in the possession of The International Trust Company, the garnishee, and unless such was the case, the act of the clerk did the plaintiff no damage. On this ground alone the court below was clearly justified in its action. And the same may be said in reference to the return days. In that respect the court below well summed up the situation and authorities in these words:

"The plaintiff's principal contention is that Section 914 of the Revised Statutes compelled the Circuit Court to follow closely the State practice in the matter of return days for the writ of summons. The federal practice differed, and it is clear that the clerk was obeying the rules of the Circuit Court upon this subject. If therefore these rules were valid he was justified in refusing to enter judgment and to issue execution. Many statutes of Massachusetts were offered in evidence at the trial, and the defendant's counsel contended then, and contends now, that the State practice concerning return days for the writ of summons substantially coincided with the federal practice about thirty years ago; that such conformity fully satisfied Section 914; and that although the State practice may have since been changed, the federal court was not obliged to follow, citing in support of this position Shepard v. Adams, 168 U. S. 618, and Railroad Co. vs. Gokey, 210 U. S. 155. In my opinion these decisions sustain the defendant's contention, and require me to hold that the plaintiff's suit in the Circuit Court for the District of Massachusetts was properly subject to the rules of that Court, and that the clerk was right in refusing to comply with the several motions referred to in the statement of claim."

We may add that in Railroad Co. vs. Gokey, supra, it appears that in the State Courts of Vermont there were but two terms in the year affecting such actions as were involved in that case, and it was thought best to have more frequent return days. They were provided for by state legislation, but as stated by Judge Wheeler, the federal "court has three regular terms in each year, and it has not been considered that to have writs returnable oftener would be advantageous for the advancement of justice or the prevention of delays." Of this action the supreme court say:

"In accordance with the views expressed in the above extract from Judge Wheeler's opinion, he, as district judge, had not altered the rule which had been first adopted in 1885 in conformity with the practice of the state court, existing at the time of its adoption. Shepard v. Adams, supra, seems to be a sufficient authority for the

refusal of the judge to alter the rule of the Circuit Court so as to be in conformity with the alteration made by the state statute in 1893."

It will thus be seen that the Supreme Court of the United States has laid down the law applicable to the present case, for the general situation as to variance between the State and Federal Courts in rules, procedure and return days is substantially the same in Massachusetts and Vermont.

The judgment of the court below is therefore affirmed.

Endorsed: 1473. Opinion of the Court Received and Filed April 12, 1911. Saunders Lewis, Jr., Clerk.

In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1911.

No. 1473 (List No. 27).

UNITED STATES to the Use of ROBERT D. KINNEY, Plaintiff in Error,
vs.
THE UNITED STATES FIDELITY & GUARANTY COMPANY, Defendant in Error.

In Error to the Circuit Court of the United States for the Eastern District of Pensylvania.

This cause came on to be heard on the transcript of record from the Circuit Court of the United States for the Eastern District of Pensylvania, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said Circuit Court in this cause be, and the same is hereby affirmed with costs.

W. M. LANNING,
Circuit Judge.

Endorsed: 1473. Order affirming judgment. Received and Filed April 24, 1911. Saunders Lewis, Jr., Clerk.

And afterwards, to wit, on the tenth day of May, 1911, Plaintiff in Error filed a petition for a writ of error to the Supreme Court of the United States, and assignments of error.

And afterwards, to wit, on the seventeenth day of May, 1911, upon consideration of the said petition for writ of error, the Court entered an order denying the same, but without prejudice to the petitioner applying to a justice of the Supreme Court for allowance of a writ.

UNITED STATES OF AMERICA,
Eastern District of Pennsylvania,
Third Judicial Circuit, set:

I, Saunders Lewis, Jr., Clerk of the United States Circuit Court of Appeals, for the Third Circuit, do hereby Certify the foregoing to be

a true and faithful copy of the original transcript of record and proceedings in this court, in the case of United States to the use of Robert D. Kinney, vs. The United States Fidelity & Guaranty Company, on file, and now remaining among the records of the said Court, in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this Second day of June, in the year of our Lord one thousand nine hundred and eleven, and of the Independence of the United States the one hundred and thirty-fifth.

[Seal United States Circuit Court of Appeals, Third Circuit.]

SAUNDERS LEWIS, JR.,
Clerk of the U. S. Circuit Court of Appeals, Third Circuit.

In the Supreme Court of the United States, —— Term, 1911.

No. —.

THE UNITED STATES OF AMERICA at the Relation and to the Use of ROBERT D. KINNEY, Plaintiff in Error,
vs.
THE UNITED STATES FIDELITY & GUARANTY COMPANY, a Corporation, Defendant in Error.

Petition for Writ of Error.

To the Honorable the Chief and Associate Justices of the above named Court:

The petition of Robert D. Kinney, the relator and use plaintiff in in error, respectfully represents:—

That there is now pending in the United States Circuit Court of Appeals for the Third Circuit, the cause as above entitled, the same being docketed in said Court of Appeals as No. 1473 of March Term, 1911, and that a judgment has therein been rendered adverse to your petitioner on the 12th day of April, 1911, affirming a judgment of the Circuit Court of the United States for the Eastern District of Pennsylvania, and that the matter in controversy in said suit exceeds One thousand dollars besides costs, and that said cause is one arising under the laws of the United States and is a proper case to be reviewed by this honorable court upon writ of error because the action herein was brought in the court below directly against the surety on the official bond of the Clerk of the United States Circuit Court for the District of Massachusetts for the recovery of losses sustained by your petitioner by reason of the neglect and failure on the part of Charles K. Darling, Esquire, in his official capacity as such clerk to issue an execution process on a final judgment obtained by your petitioner as the plaintiff in a cause therein commenced by trustee process (a form of attachment) the lien of the attachment of which on the goods, effects and credits of the defendant was afterwards lost to your petitioner because of said neglect and failure to

issue said execution on plaintiff's timely application duly made therefor, it being provided by the laws governing said process that unless execution demand be made on the trustee within thirty days after the entry of final judgment in the case the lien created by the service of such process becomes ipso facto dissolved and said neglect and failure upon the part of said Darling as Clerk of said Court made at impossible for your petitioner to cause such execution demand to be made within the time limited by the statute for so doing.

Your petitioner further shows that on the 25th day of April, 1911, he duly presented his petition to the Honorable Justices of said Circuit Court of Appeals praying the allowance of a writ of error and directions to the clerk of said court that the record and proceedings in said cause with all things concerning the same be sent to the Supreme Court of the United States in order that the errors complained of in the assignments of error therewith filed may be reviewed, and if error be found, corrected according to the laws and customs of the United States, and that thereupon the said Circuit Court of Appeals on the 17th day of May, 1911, made and entered its per curiam order denying the prayer aforesaid of your petitioner therein, but so doing "without prejudice to the petitioner applying to a Justice of the Supreme Court for allowance of a writ," reference being had to the record thereof will appear.

Your petitioner further shows that by the decision and judgment of this Honorable Court in the case of the United States vs. American Bell Telephone Company, (reported in 159 U. S. 548) the decision of the Circuit Court of Appeals may be reviewed by this Supreme Court, as a matter of right, on appeal or writ of error, where the decision of said court is not made final by the Act of March 3rd 1891, chap. 517, and the matter in controversy exceeds the sum of One thousand dollars in value besides costs, and that this court, in the case of Howard vs. United States to the use of Stewart, (reported in 184 U. S. 676), decided that an action brought on the official bond of a clerk of a United States Circuit Court was of the class of cases the Supreme Court could take cognizance, independently of the citizenship of the parties to the action, and in so deciding made use of this language:—

"But does it not appear from the petition itself that the case was one of which the Circuit Court could take cognizance independently of the citizenship of the real parties in interest? This question must receive an affiramtive answer. The suit was directly upon a bond taken by the Circuit Court in conformity with the Statutes of the United States, and the case depends upon the scope and effect of that bond and the meaning of those statutes. It was therefore a suit arising under the laws of the United States, of which the Circuit Court (concurrently with the courts of the State) was entitled to take original cognizance, even if the parties had been citizens of the same State (citing authority). This court has heretofore decided that a suit upon a bond of a marshal of the United States was one arising under the laws of the United States (citing authority). The same principle must be held to be applicable to suits upon the bond of a clerk of a court of the United States. * * * It results that, al-

though the petition shows a case of diverse citizenship, jurisdiction was not dependent entirely upon such citizenship. Jurisdiction was likewise invoked, and rightfully, upon Federal grounds. And as the case was one which could not have been brought here directly from the Circuit Court, the final judgment of the Circuit Court of Appeals could be reviewed in this court upon writ of error sued out by the defendants."

And so it is that your petitioner contends that by reason of the decision in your petitioner's case at bar, and the others above cited, your petitioner is entitled of right to have a review of the said decision by this honorable court, and therefore your petitioner prays that a writ of error be allowed him in the above entitled cause directed to the Circuit Court of Appeals for the Third Circuit and requiring its clerk to send duly authenticated the record and proceedings in said cause with all things concerning the same to the Supreme Court of the United States, in order that the errors complained of in the assignment of errors herewith filed by said plaintiff in error may be reviewed, and if error be found, corrected according to the laws and customs of the United States.

ROB'T D. KINNEY,
Pro se, Use-Plaintiff, Petitioner.
For Plaintiff in Error.

EASTERN DISTRICT OF PENNSYLVANIA,
City and County of Philadelphia, ss:

Robert D. Kinney, being duly sworn according to law, on his oath deposes and says that he is the petitioner above named and that the facts set forth in said petition as the basis for the relief therein prayed for are true to the best of his knowledge, information and belief.

ROB'T D. KINNEY.

Sworn and subscribed to before me this 20th day of May, 1911.

[Seal of Thos. W. Wilkinson, Notary Public, Philadelphia.]

THOS. W. WILKINSON,
Notary Public.

My commission expires Jan. 18, 1913.

Allowed June 5, 1911.
HORACE H. LURTON,
Associate Justice.

The United States Circuit Court of Appeals for the Third Circuit, March Term, 1911.

No. 1473.

THE UNITED STATES OF AMERICA to the Use of ROBERT D. KINNEY, Plaintiff in Error,

vs.

THE UNITED STATES FIDELITY & GUARANTY COMPANY, Defendant in Error.

Assignments of Error.

And now come the plaintiff in error above named and say that in the record and proceedings aforesaid of said United States Circuit Court of Appeals for the Third Circuit, in the above entitled cause, and in the rendition of the final judgment therein, manifest error has intervened to the prejudice of said plaintiff in error in this, to wit:

First. Said Circuit Court of Appeals erred in entering judgment affirming the judgment of the Circuit Court of the United States for the Eastern District of Pennsylvania, entered on January 4th 1911 in favor of said defendant in error and against said plaintiff in error.

Second. Said Circuit Court of Appeals erred in not reversing and annulling the said judgment of the United States Circuit Court aforesaid, and in not remanding said cause to said Circuit Court with instructions to enter judgment in favor of said plaintiff in error and against the said defendant in error, non obstante veredicto.

Third. Said Circuit Court of Appeals erred in holding that said Circuit Court rightly held that the proofs of Mr. Kinney (meaning the use plaintiff in error) did not show there were any funds of the Plymouth Rock Squab Company in the possession of the International Trust Company, garnishee, (meaning the trustee) and therefore such alone was sufficient to sustain the judgment rendered against the plaintiff in error; whereas, according to the laws and customs of the United States the burden of such proof is not upon the plaintiff in such cases and that, moreover, by said laws and customs it should have been held by said Circuit Court of Appeals that the filing by said Kinney of the following recited order, to wit:

"EXHIBIT No. 3.

In the Circuit Court of the United States in and for the District of Massachusetts, February Term, 1909.

No —, Action of Contract.

ROBERT D. KINNEY, Plaintiff,
v.
PLYMOUTH ROCK SQUAB COMPANY, Defendant; INTERNATIONAL TRUST COMPANY, Trustee.

To Charles K. Darling, Esq., Clerk of the above stated Court:

Enter judgment by default adjudging the International Trust Company, trustee of the defendant Plymouth Rock Squab Company, for want of its appearance and answer filed in the above entitled cause.

(Signed) ROB'T D. KINNEY,
Pro se, Plaintiff.
December 20, 1909."

constitutes in law, under the circumstances of said case, the rendition and entry of a valid judgment that is binding and conclusive upon said Circuit Court as evidence to it of there having been at the time of the service of the original process in said cause goods, effects and credits belonging to the defendant in said cause in the hands and possession of its said trustee sufficient in value to have fully satisfied said Kinney's claim there in suit, more especially as said order was pleaded and put in evidence by said Kinney in said Circuit Court below and its verity not then and there denied by affidavit of defense filed or otherwise controverted on the part of the defendant in error.

Fourth. Said Circuit Court of Appeals erred in holding that said Circuit Court rightly held that Mr. Darling (meaning the principal of the defendant in error named in the bond on which suit was brought in the court below) was justified in not docketing the action of the use plaintiff in error as also in his refusals to obey the orders and præcipes of said use plaintiff in other respects in his said suit because of his (Darling's) pretence that said use plaintiff had made a mistake in his stating in his writ the day on which it should be returned; whereas, the lien of the attachment, created by the Marshal's service of said writ, against goods, effects and credits belonging to the defendant therein in the hands and possession of its trustee therein, having become dissolved by operation of law and lost to said use plaintiff for want of timely execution demand that was frustrated by said Darling's refusal, as clerk of court, to obey the præcipes and orders to him delivered and directed therein by said use plaintiff, the said Circuit Court of Appeals should have adjudged the said Circuit Court in error in not holding that said Darling, as Clerk of Court, was in duty bound to obey the præcipes and orders of

said use plaintiff in his said proceedings and have left to the parties all matters of supposed irregularities in said process for them to question and prosecute should they have deemed them such and that for his failure in not having done so he was liable on his official bond for the loss thereby resulting to said use plaintiff.

Fifth. Said Circuit Court of Appeals erred in holding that the said Circuit Court rightly held that in the matter of return days the rules of the Federal Court differed from the return days fixed by the practice of the State Court that was followed by said use plaintiff in his naming the return day in his said writ; whereas, Rule 9 of the Circuit Courts of the United States for the First Circuit as promulgated February 2, 1903 adopted for their common law causes all the State Laws then in force in the States constituting their respective districts and therefore said Circuit Court of Appeals should have adjudged the said Circuit Court below in error in holding that the practice of the said Federal Court and the State Court differed in the matter of their return days in respect to the trustee process purchased by said use plainiff in his said proceedings in the United States Circuit Court for the District of Massachusetts it being within the judicial knowledge of all United States Courts that said Circuit Court for the District of Massachusetts is one of the Circuit Courts so adopting the practice of the State Court as also that said Rule 9 was in full force and effect at the time of the commencement of said proceedings of said use plaintiff in the Massachusetts District.

Sixth. Said Circuit Court of Appeals erred in not giving in its opinion filed consideration to and sustaining the first assignment of error upon the record in said cause.

Seventh. Said Circuit Court of Appeals erred in not giving in its opinion filed consideration to and sustaining the second assignment of error upon the record in said cause.

Eighth. Said Circuit Court of Appeals erred in not giving in its opinion filed consideration to and sustaining the third assignment of error upon the record in said cause.

Ninth. Said Circuit Court of Appeals erred in not giving in its opinion filed consideration to and sustaining the fourth assignment of error upon the record in said cause.

Tenth. Said Circuit Court of Appeals erred in not giving in its opinion filed consideration to and sustaining the fifth assignment of error upon the record in said cause.

Eleventh. Said Circuit Court of Appeals erred in not giving in its opinion filed consideration to and sustaining the sixth assignment of error upon the record in said cause.

Twelfth. Said Circuit Court of Appeals erred in not giving in its opinion filed consideration to and sustaining the seventh assignment of error upon the record in said cause.

Wherefore, the said plaintiff in error above named prays that for the errors aforesaid and other errors appearing in the record of said United States Circuit Court of Appeals in the above entitled cause to the prejudice of the plaintiff in error the said judgment of the United States Circuit Court of Appeals be reversed, annulled, and for naught esteemed, and that said cause be remanded to the United

States Circuit Court for the Eastern District of Pennsylvania with instructions to enter judgment for the plaintiff in said cause, or for such other or further proceedings in said cause as may be determined upon by this honorable court, to the end that justice may be done in the premises.

ROB'T D. KINNEY,
Pro se, Use Plaintiff,
For Plaintiff in Error.

[Endorsed:] No. —, —— Term, 1911. Supreme Court of the United States. The United States of America, at the relation and to the use of Robert D. Kinney, Plaintiff in Error, vs. The United States Fidelity & Guaranty Company, a corporation, Defendant in Error. Petition for writ of error, and Assignments of Error. Rob't D. Kinney, Pro se, Use-Plaintiff, for Plaintiff in Error. May 22, 1911. No. 815 N. 42nd Street, Philadelphia, Penna.

Send certified complete transcript of record with petition for appeal, assignment of errors & citation—certified appeal back to clerk who will then send to me.

LURTON.

In the Supreme Court of the United States, —— Term, 1911.

No. —.

THE UNITED STATES OF AMERICA at the Relation and to the Use of ROBERT D. KINNEY, Plaintiff in Error,
vs.
THE UNITED STATES FIDELITY & GUARANTY COMPANY, a Corporation, Defendant in Error.

Sur Petition for Writ of Error to the United States Circuit Court of Appeals for the Third Circuit.

Affidavit to Dispense with Bond Required for Defendant's Costs.

UNITED STATES OF AMERICA,
Eastern District of Pensylvania, ss:

Robert D. Kinney, being duly sworn according to law, on his oath deposes and says that he is the relator and use-plaintiff above named in the cause therein entitled, and that because of his poverty he is unable to give the writ of error bond in the sum of Five hundred dollars, ($500.00), certified to as to sufficiency of sureties by some United States Judge or clerk; as is required of him, as a security for the costs of the defendant in error in said cause above stated, by the Honorable Justice Lurton of said Supreme Court of the United States as a condition precedent to the consideration by him of deponent's above stated application for writ of error, as by the notification of the clerk of said court to this deponent appears.

Deponent further says that he believes that he is entitled to the redress he seeks by such writ of error and that the nature of his cause of action and grounds for writ of error so applied for is correctly and concisely set out in his said petition and the therewith assignments of error presented to said Supreme Court and which by the Honorable the Chief Justice thereof has been referred to the said the Honorable Justice Lurton in the premises.

Deponent further shows that this affidavit is made and presented in the premises for the purpose of availing himself of the rights and privileges in such case provided by the Act of Congress, Chapter 209, approved July 20, A. D. 1892, as amended by Act of Congress Chapter 435 approved June 25, A. D. 1910.

Deponent further says that there is no person interested with deponent, by contract or otherwise, in the cause of action, or entitled to share in any recovery thereon.

And further deponent saith not.

ROB'T D. KINNEY.

Sworn to and subscribed before me this 3rd day of June, A. D. 1911.

[Seal of Thos. W. Wilkinson, Notary Public, Philadelphia.]

THOS. W. WILKINSON,
Notary Public.

My commission expires Jan. 18, 1913.

186 U. S. 177.
195 U. S. 243.
Act of June 25, 1910.

[Endorsed:] No. —, —— Term, 1911. Supreme Court United States. The United States of America, at the relation and to the use of Robert D. Kinney, Plaintiff in Error, vs. The United States Fidelity & Guaranty Company, a corporation, Defendant in Error. Sur Petition for writ of error to the United States Circuit Court of Appeals for the Third Circuit. Affidavit to dispense with bond required for defendant's costs. Rob't D. Kinney, Pro se, Use-Plaintiff, for Plaintiff in Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the United States Circuit Court of Appeals for the Third Circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court of Appeals before you, or some of you, between The United States of America at the relation and to the use of Robert D. Kinney, plaintiff in error, and The United States Fidelity & Guaranty Company, defendant in error, a manifest error hath happened, to the great damage of the said plaintiff in error as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and

speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 6th day of June, in the year of our Lord one thousand nine hundred and eleven.

[Seal of the Supreme Court of the United States.]

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by
HORACE H. LURTON,
Associate Justice of the Supreme Court of the United States.

UNITED STATES OF AMERICA, *ss:*

To The United States Fidelity & Guaranty Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the United States Circuit Court of Appeals for the Third Circuit wherein The United States of America at the relation and to the use of Robert D. Kinney is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Horace H. Lurton, Associate Justice of the Supreme Court of the United States, this sixth day of June, in the year of our Lord one thousand nine hundred and eleven.

HORACE H. LURTON,
Associate Justice of the Supreme Court of the United States.

Service accepted.
BAYARD HENRY,
Per THOMAS STOKES,
Att'y for United States Fidelity & Guaranty Co.

June 12, 1911.

Endorsed on cover: File No. 22,740. U. S. Circuit Court Appeals, 3d Circuit. Term No. 664. The United States of America at the relation and to the use of Robert D. Kinney, plaintiff in error, vs. The United States Fidelity & Guaranty Company. Filed June 16th, 1911. File No. 22,740.

2

No. 664 OCTOBER TERM, 1911

IN THE

Supreme Court of the United States

THE UNITED STATES OF AMERICA at the relation and to the use of ROBERT D. KINNEY

Plaintiff in Error

vs.

THE UNITED STATES FIDELITY AND GUARANTY COMPANY

In Error to the United States Circuit Court of Appeals for the Third Circuit

Brief of Plaintiff in Error on Motion to Dismiss and to Affirm

ROBERT D. KINNEY,
Pro se, Use-Plaintiff,
for Plaintiff in Error.

IN THE

Supreme Court of the United States

October Term, 1911. No. 664

THE UNITED STATES OF AMERICA AT THE RELATION AND TO THE USE OF ROBERT D. KINNEY

Plaintiff in Error

vs.

THE UNITED STATES FIDELITY AND GUARANTY COMPANY

BRIEF OF PLAINTIFF IN ERROR ON MOTION TO DISMISS AND TO AFFIRM

STATEMENT OF THE CASE.

The action in the trial court below is assumpsit on a contract of suretyship, the breach complained of being the neglect and refusal of the defendant's principal, in the bond in suit, as clerk of the Circuit Court of the United States for the District of Massachusetts, to docket an action, entered default judgments therein and issue execution thereon, notwithstanding the plaintiff's præcipes to him directed and duly filed for the purpose.

On the filing of the statutory affidavit of defence in the trial court below, the plaintiff, following the practice of its jurisdiction, entered a rule for judgment for want of a sufficient affidavit of defence, which rule, on hearing, was discharged by the court.

To this decision the plaintiff excepted and ruled the defendant to plead, and on the case being called for trial, but before the jury was called and sworn, the plaintiff filed his motion for judgment on the record grounds that (1) the defendant admitted the truth of the material allegations of

the statement of claim; (2) that the material averments of a sufficient statement of claim are not denied; (3) and that the defendant has not set up new matter constituting a legal defence. This motion the court over-ruled, with exception to plaintiff, who thereupon proceeded to prove his case before the jury by offering in evidence the statement of claim filed in the cause, together with the defendant's affidavit of defence filed thereto; the offer being accompanied with the staement that it was restricted to those parts of the statement of claim that was not denied in the affidavit of defence. To this offer the trial judge ruled that the statement of claim was admitted in evidence, and the affidavit of defence excluded therefrom, with exception to the plaintiff.

On the conclusion of the trial the plaintiff requested the court to charge the jury upon points duly submitted, which points the trial judge refused to read to the jury, and, instead, without charging the jury as to the law of the case, summarily directed it to render its verdict for the defendant, with exception to plaintiff.

Judgment in favor of the defendant was entered on the verdict so obtained and the case removed by the plaintiff on writ of error to the United States Circuit Court of Appeals, the clerk of the court below certifying the record in accordance with plaintiff's præcipe filed therefor and certified with the record.

The plaintiff, relying upon the record admissions of the defendant, as evidenced by its affidavit of defence filed in the cause, together with the statements of fact admitted to the record by leave of the trial judge below (pp. 34, 36, 37, 38, 44, Trans. Rec.), has not permitted the stenographer's notes of the trial to be filed of record in the cause because of a material omission in them, that is to say, a part of same should, but does not, read as follows:

> "MR. KINNEY: I propose, if your Honor please, to offer a copy of the statement of claim and the defendant's affidavit of defence filed in this case, reserving all just exceptions, restricting it only to those parts that

serve to obviate the necessity of proving the facts there admitted or not denied.

"THE COURT: I cannot rule on such a proposition as that. It is too general. It is too vague.

"MR. KINNEY: The proposition is to prove all statements of fact contained in the plaintiff's statement by the admission of the defendant. A fact admitted is not required to be proved, I believe, is the law of the land.

"THE COURT: When you make a specific offer I will rule on it.

"MR. KINNEY: I will take up the statement of claim paragraph by paragraph. 'The Plaintiff, the United States of America,' at etc. * * *

"THE COURT: You need not read the statement of claim. Your statement of claim is part of the record in the case undoubtedly. You can use it for any purpose you please.

"MR. KINNEY: It will not be evidence unless it is offered here.

"THE COURT: You can use it for any purpose you please.

"MR. KINNEY: Then, I offer the statement of claim in evidence.

"THE COURT: The statement of claim is admitted in evidence.

"MR. KINNEY: Subject to the restriction *stated before and for the purpose* of proving that which is either admitted or not denied in the affidavit of defence, *I now offer the affidavit of defence in evidence. (Objection by Mr. Stokes, on grounds of not being evidence. Objection sustained, exception for plaintiff.)"*

The portion above indicated by italics is not to be found in those notes and the plaintiff having promptly requested the stenographer to correct his said notes accordingly, was afterwards informed by him that counsel for the defendant made objection to such correction being made.

The affidavit of defence in the cause was filed by the defendant in pursuance of the requirement of the Act of Assembly of the State of Pennsylvania, approved May 25, 1887, (P. L. 271), which, so far as material to this case, reads as follows:

"Section 1. Be it enacted, etc., That, so far as relates to procedure, the distinction heretofore existing between actions ex contractu be abolished, and that all demands heretofore recoverable in debt, assumpsit, or covenant, shall hereafter be sued for and recovered in one form of action to be called an 'action of assumpsit.'"

"Sec. 3. The plaintiff's declaration, * * * shall consist of a concise statement of the plaintiff's demand, * * *, and shall be replied to by affidavit.

"Sec. 4. * * * it shall be the duty of the defendant * * * to file an affidavit of defence on or before the return day.

"Sec. 5. * * * judgment may be moved for want of an affidavit of defence, or for want of a sufficient affidavit, for the whole or part of the plaintiff's claim, as the case may be, in accordance with the present practice in actions of debt and assumpsit.

"Sec. 7. Special pleading is hereby abolished. In the action of assumpsit, the plea of the general issue shall be 'non assumpsit.' The defendant * * * shall be at liberty, in addition to the plea of 'non assumpsit.' to plead payment, set-off, and also the bar of the Statute of Limitations, and no other pleas."

The affidavit filed in the cause contains, *inter alia*, admissions as follows: (pp. 30, 31, Trans. Rec.)

"Deponent admits that the plaintiff on or about October 14th, 1909, obtained a writ from the office of the clerk of the United States Circuit Court for the District of Massachusetts in a certain action as set forth in plaintiff's statement, and that the plaintiff made said writ returnable to the first Monday of December, 1909, and said

writ, was returned by the Marshal, who filed it with said clerk on October 26th, 1909."

"Deponent admits that on or about December 20th, 1909, and December 27th, 1909, plaintiff filed with said clerk motions or præcipe for judgment by default in said action, and that on December 30th, 1909, filed a præcipe for process of execution to be issued."

The statement of claim sets out a copy of the writ, alluded to in the foregoing admissions, which writ includes a clause therein reading as follows: (p. 24, Trans. Rec.)

"And whereas the said Robt. D. Kinney (plaintiff) says that the said Plymouth Rock Squab Company (the defendant) has not in its own hands and possession, goods and estate to the value of $18,309.84 aforesaid, which can become at to be attached; but has entrusted to, and deposited in the hands and possession of the International Trust Company, Boston, aforesaid trustee of the said Plymouth Rock Squab Company goods, effects, and credits, to the said value: We command you, therefore, that you summon the said, The International Trust Company (if it may be found in your district) to appear before our Justices of our said court, to be holden as aforesaid, to show cause, if any it has, why execution to be issued upon such judgment as the said Robt. D. Kinney may recover against the said Plymouth Rock Squab Company in this action (if any) should not issue against its goods, effects, or credits, in the hands and possession of the said International Trust Company, and have you there this writ. * * *"

Said writ also bears the endorsement of the return thereof made by the Marshal reading as follows: (p. 25, Trans. Rec.)

"UNITED STATES OF AMERICA,

"MASSACHUSETTS, *ss.* "BOSTON, OCTOBER 26th, 1909.

"Pursuant hereunto I have this day, at twelve o'clock and thirty minutes, P. M., delivered in the hands of John M. Graham, as he is President of The International

Trust Company, 45 Milk Street, Boston, a true and attested copy of this writ. And afterwards on the same day I have delivered in the hands of Albert F. Wright, as he is President of the Plymouth Rock Squab Company, named in this writ, a true and attested copy of this writ at 1355 Washington Street, West Newton, Massachusetts, together with a copy of the plantiff's declaration, all by direction of Robert D. Kinney, Plaintiff.

"(Signed) JAMES D. RUHL,
"Deputy, U. S. Marshal."

It is not denied in the affidavit of defence that the averments embodying the foregoing extracts from the writ are true in every particular, as set forth in the statement of claim and made a part thereof.

BRIEF OF ARGUMENT.

The learned counsel for the defendant in error moves that the writ of error be dismissed because *"none of the evidence given at the trial nor the charge of the court has been made a part of the record."*

The learned counsel mistakes his remedy for the case he alleges. He should suggest a specific diminution of the record in matter necessary to the hearing in this court and ask for *certiorari* when the question as to the necessity of additional matter will be determined by the appellate court.

Nashan, etc., Co. *vs.* Boston, etc., Co., 9 C. C. A., 468 (61 Fed., 237).

Burnham *vs.* North Chicago, etc., Co., 30 C. C. A., 594 (87 Fed., 170).

It will be noticed (p. 49, Trans. Rec.) that the certificate of the clerk of the trial court to the transcript of record is in proper form and made according to the plaintiff's præcipe authorizing it. A writ of error will not be dismissed for omission in the transcript where the clerk's certificate states that it is according to præcipe.

Burnham *vs.* North Chicago Ry. Co., 30 C. C. A., 594 (87 Fed., 168, 170).

United States *vs.* Davenport's Heirs, 124 U. S., 704.
Gregory *vs.* Pipe, 64. Fed., 415.
United States *vs.* Gomez, 1 Wall, 690.
Missouri, etc., Ry. Co. *vs.* Dinsmore, 108 U. S., 30.

The learned counsel states in his brief that the "charge of the court" has not been made a part of the record. Beyond the summary direction to the jury to render its verdict for the defendant, the trial proceedings were not dignified with a charge to the jury as observed in orderly proceedings had in courts for the due administration of justice. The stenographer's notes, alluded to in these proceedings here at bar, contain all the trial judge said to the jury by way of "charge" in the following words:

"THE COURT: I entirely agree with the juror who has just spoken. These facts are undisputed, so far as the record proves any facts, whatever evidence there is in the case is not disputed, and the questions that are presented are questions of law, in my judgment. I agree with what has been said. I do not think, therefore, there is anything to be submitted to the jury at all in the case, and taking the view that I do take, at present, in any event, I instruct the jury to render a verdict in favor of the defendant.

"MR. KINNEY: Will your honor grant me an exception?

"THE COURT: Yes.

"(Exception noted for plaintiff by direction of the court.)"

The record as made up for the purpose of this court contains the defendant's affidavit of defence and the plaintiff's statement of claim and as there are no issues of material fact raised by the affidavit of defence, it is not clear what further matter the learned counsel deems necessary for the hearing of the case in this court on the questions involved for appellate consideration and decision. The so-called verdict of the jury in the cause has not modified the admitted facts in the case as stated in the statement of claim. The jury was not permitted

to pass upon those facts. Its intervention in the case, obviously, was superfluous and manifestly designed to nominally make in appearance by the record a more stronger case for the defendant in error by giving color of justice to the judgment of the trial court. The evidence of the defendant is covered by its affidavit of defence. There was no new matter presented by the evidence.

In respect to the motion to affirm, on the grounds "*that the question upon which it is claimed that the jurisdiction depends is so frivolous as not to need further argument,*" it is submitted that inasmuch as the action has been brought directly on the official bond of a clerk of the Circuit Court of the United States (p. 7, Trans. Rec.), it presents a suit arising under the laws of the United States and as the matter in controversy exceeds one thousand dollars in value besides costs (p. 6, Trans. Rec.), it is a case where this Supreme Court of the United States not only has jurisdiction, but it is plaintiff's right to have its review of the judgment of the Circuit Court of Appeals on the process in error, which has been duly sued out and prosecuted in the case.

U. S. *vs.* American Bell Telephone Co., 159 U. S., 548.
Howard *vs.* U. S. to use Stewart, 184 U. S., 676.

As the transcript of record in the case has already been printed and is now in the custody of the clerk of this court, it is not understood to be a requirement for the hearing of this motion that matter material for this hearing therein contained should be reprinted in this brief, and, therefore, reference is made to such printed transcript by page number only.

Respectfully submitted,

Rob. D. Kinney

Pro se, Use-Plaintiff,
for Plaintiff in Error.

November 27th, 1911.

No. 664 OCTOBER TERM, 1911

IN THE

Supreme Court of the United States

THE UNITED STATES OF AMERICA at the relation
to the use of ROBERT D. KINNEY,
Plaintiff in Error

vs.

THE UNITED STATES FIDELITY AND GUARANTY COMPANY

In Error to the United States Circuit Court of Appeals for the Third Circuit

Brief of Plaintiff in Error

ROBERT D. KINNEY,
Pro se, Use-Plaintiff,
for Plaintiff in Error.

INDEX

IN THE

Supreme Court of the United States

October Term, 1911. No. 664

THE UNITED STATES OF AMERICA AT THE RELATION AND TO THE USE OF ROBERT D. KINNEY
Plaintiff in Error

vs.

THE UNITED STATES FIDELITY AND GUARANTY COMPANY

BRIEF OF PLAINTIFF IN ERROR

(1.) STATEMENT OF THE CASE.

The action in the trial court was assumpsit on a contract of surety-ship brought on the official bond of the clerk of the United States Circuit Court for the District of Massachusetts for the recovery of $19,140.10, with interest from January 31, 1910, for damages sustained by the neglect and refusal of said clerk to issue an execution on a final judgment obtained in that court by the use-plaintiff, as the plaintiff in an action commenced by trustee-process or garnishment, the consequence of said neglect and refusal being that the use-plaintiff, as the plaintiff in that action, lost the lien of his attachment on estate and credits sufficient in amount to have fully satisfied the judgment.

The trial court overruled the use-plaintiff's motion for judgment for want of a sufficient affidavit of defence; and also the use-plaintiff's motion for judgment (made on the call of the case for trial, but before the jury was called and sworn), on the record grounds (1) that the defendant admits the material allegations of the statement of claim; (2) that the material averments of a sufficient statement of claim are not denied; (3) and that the defendant has not set up new matter constituting a legal defence.

On the conclusion of the trial the court instructed the jury to render its verdict for the defendant (the defendant in error in this court) and on writ of error to the Circuit Court of Appeals the judgment of the trial court was affirmed on the grounds that there was no proof that there were any funds in the possession of the trustee subject to the attachment process and unless such was the case, the act of the clerk in refusing execution did the plaintiff no damage; and that the clerk of court was justified in following the rules of the Circuit Court (sic) as to return days, in his refusal to docket the cause and to enter the default judgments as directed by the use-plaintiff as the plaintiff in that cause.

The QUESTIONS INVOLVED are as follows:

1. Whether, in view of the absence of averment and proofs on the part of the defendant, tending to show that the use-plaintiff's judgments and attachment are of no or less value than that set out in the record of those proceedings, as recited in the statement of claim and shown by the evidence submitted to the jury on the part of the use-plaintiff, the burden of proof rested on the use-plaintiff to also show to the jury that there were funds or other property belonging to the judgment-defendant in the hands of its trustee or garnishee that was subject to the use-plaintiff's original process of attachment on it?

2. Whether, in view of the absence of a controversy as to its verity, the order of the use-plaintiff (exhibit No. 3, pp. 27 and 57 of Transcript of Record), filed for the entry of judg-

ment on default against the trustee, constitutes in law, under the circumstances of said case, the rendition and entry of a valid judgment that is binding and conclusive upon the trial court below as evidence to it of there having been goods, effects and credits in the hands of the trustee, subject to the attachment process served on it in said cause, sufficient in value to have fully satisfied the use-plaintiff's claim there in suit?

3. Whether the defendant in its affidavit of defence filed in the court below admits the material averments of the plaintiff's statement of claim sufficiently as to entitle plaintiff to judgment on motion therefor, based on such admissions?

4. Whether the defendant in its affidavit of defence filed in the court below has set up new matter which, if true, in point of fact, constitutes a full and complete legal defence to the plaintiff's action?

5. Whether the material averments of the plaintiff's statement of claim are sufficiently denied in defendant's affidavit of defence filed thereto to prevent summary judgment for want of a sufficient affidavit of defence or motion made therefor?

6. Whether the default of the person summoned as trustee in not entering its appearance and filing its answer, as also the default of the defendant in not appearing, as required by the mandate of the process served on them, respectively, tended to show, and the jury would have been therefore justified in finding as a fact that the use-plaintiff's claim or debt owing him, was lost by reason of the neglect and refusal of said clerk of court to obey the use-plaintiff's directions to him in respect to docketing the action, entering judgments on said defaults and issuing execution thereon?

7. Whether the use-plaintiff's writ and the marshal's return thereon of personal service, with proof of the alleged trustee's default in not appearing and answering, in obedience to the mandate of said writ, together with the defendant's default in not appearing within ten days after the return day named in said writ, and the use-plaintiff's directions to the clerk of court for entry of judgments on said defaults, all taken

and considered together, sufficiently establishes the fact and the amount of the use-plaintiff's damages in the court below in the absence of averment and proof on the part of the defendant below tending to disprove the proceedings or that the judgments and attachments, as set out in the statement of claim, were of less than face value or of no value?

8. Whether the statement of claim and the affidavit of defence filed thereto when taken and considered together as a whole (as offered by the plaintiff and overruled by the court, p. 44 of Transcript of Record, Fourth Assignment of Error), are admissible as between the parties thereto as proof of the truth of the facts sufficiently averred in the statement and not denied in the affidavit of defence?

9. Whether the statement of claim, *per se*, exclusive of the affidavit of defence filed thereto (as ruled by the trial court, p. 44 of Transcript of Record, Fourth Assignment of Error), is admissible as competent evidence against the defendant therein as proof of the truth of the averments of fact therein set forth as the basis of claim?

10. Whether, in view of Rule 9, Section 1, of the Rules of the Circuit Court of the United States for the District of Massachusetts (p. 48 of Transcript of Record), the plea and proof of Sections 1 and 2 of Rule 7 of said rules (p. 31, Transcript of Record), constitutes a sufficient defence in law in justification of the defendant's principal in the bond in suit (the clerk of court), for not having docketed the use-plaintiff's said action in said Circuit Court?

11. Whether the use-plaintiff's writ (exhibit No. 1, p. 23, of Transcript of Record), with its endorsement by the marshal, showing personal service forty days prior to the return day therein named, is a nullity or void, as to the persons served or having to do therewith, because of the circumstance that the first Monday of December, 1909, was therein named as the return day for said writ?

12. Whether in law there was a conflict or difference between the Federal Court practice and the State Court practice

in the matter of the return days in respect to the use-plaintiff's said writ of summons wtih trustee process of attachment therein embodied?

(2.) SPECIFICATION OF ERRORS.

FIRST. Said Circuit Court of Appeals erred in entering judgment affirming the judgment of the Circuit Court of the United States for the Eastern District of Pennsylvania, entered on January 4, 1911, in favor of said defendant in error and against said plaintiff in error.

SECOND. Said Circuit Court of Appeals erred in not reversing and annulling the said judgment of the United States Circuit Court aforesaid, and in not remanding said cause to said Circuit Court with instructions to enter judgment in favor of said plaintiff in error and against the said defendant in error, *non obstante veredicto.*

THIRD. Said Circuit Court of Appeals erred in holding that said Circuit Court rightly held that the proofs of Mr. Kinney (meaning the use-plaintiff in error), did not show there were any funds of the Plymouth Rock Squab Company in the possession of the International Trust Company, garnishee (meaning the trustee), and therefore such alone was sufficient to sustain the judgment rendered against the plaintiff in error; whereas, according to the laws and customs of the United States, the burden of such proof is not upon the plaintiff in such cases and that, moreover, by said laws and customs, it should have been held by said Circuit Court of Appeals that the filing by said Kinney of the following recited order, to wit:

Exhibit No. 3.

In the Circuit Court of the United States in and for the District of Massachusetts. February Term, 1909, No.

ROBERT D. KINNEY, *Plaintiff*,

vs. Action of Contract.

PLYMOUTH ROCK SQUAB COMPANY, *Defendant.*

INTERNATIONAL TRUST COMPANY, *Trustee.*

To Charles K. Darling, Esq., clerk of the above stated court:

Enter judgment by default, adjudging the International Trust Company, trustee of the defendant Plymouth Rock Squab Company, for want of its appearance and answer filed in the above entitled cause.

(Signed) ROBT. D. KINNEY,
Pro se Plaintiff, December 20, 1909,

constitutes in law, under the circumstances of said case, the rendition and entry of a valid judgment that is binding and conclusive upon said Circuit Court as evidence to it of there having been at the time of the service of the original process in said cause, goods, effects and credits, belonging to the defendant in said cause in the hands and possession of its said trustee, sufficient in value to have fully satisfied said Kinney's claim there in suit, more especially as said order was pleaded and put in evidence by said Kinney in said Circuit Court below, and its verity not then and there denied by affidavit of defence filed or otherwise controverted on the part of the defendant in error.

FOURTH. Said Circuit Court of Appeals erred in holding that said Circuit Court rightly held that Mr. Darling (meaning the principal of the defendant in error named in the bond on which suit was brought in the court below), was justified in not docketing the action of the use-plaintiff in error as also in his refusals to obey the orders and præcipes of said use-plaintiff in other respects in his said suit because of his (Darling's) pretence that said use-plaintiff had made a mistake in his stating in his writ the day on which it should be returned; whereas, the lien of the attachment, created by the marshal's service of said writ, against goods, effects and credits belonging to the defendant therein in the hands and possession of its trustee therein, having become dissolved by operation of law and lost to said use-plaintiff for want of timely execution demand that was frustrated by said Darling's refusal, as clerk of court, to obey the præcipes and orders to him delivered and directed therein by said use-plaintiff, the

said Circuit Court of Appeals should have adjudged the said Circuit Court in error in not holding that said Darling, as clerk of court, was in duty bound to obey the præcipes and orders of said use-plaintiff in his said proceedings and have left to the parties all matters of supposed irregularities in said process for them to question and prosecute, should they have deemed them such, and that for his failure in not having done so he was liable on his official bond for the loss thereby resulting to said use-plaintiff.

FIFTH. Said Circuit Court of Appeals erred in holding that the said Circuit Court rightly held that in the matter of return days the rules of the Federal Court differed from the return days fixed by the practice of the State Court that was followed by said use-plaintiff in his naming the return day in his said writ; whereas, Rule 9 of the Circuit Courts of the United States for the First Circuit, as promulgated February 2, 1903, adopted for their common law causes all the State laws then in force in the States constituting their respective districts, and therefore said Circuit Court of Appeals should have adjudged the said Circuit Court below in error in holding that the practice of the said Federal Court and the State Court differed in the matter of their return days in respect to the trustee process purchased by said use-plaintiff in his said proceedings in the United States Circuit Court for the District of Massachusetts, it being within the judicial knowledge of all United States Courts that said Circuit Court for the District of Massachusetts is one of the Circuit Courts so adopting the practice of the State Court, as also that said Rule 9 was in full force and effect at the time of the commencement of said proceedings of said use-plaintiff in the Massachusetts District.

SIXTH. Said Circuit Court of Appeals erred in not giving in its opinion filed consideration to and sustaining the first assignment of error upon the record in said cause, namely, "The court erred in discharging plaintiff's rule (motion) for judgment for want of a sufficient affidavit of defence."

SEVENTH. Said Circuit Court of Appeals erred in not giving in its opinion filed consideration to and sustaining the second assignment of error upon the record in said cause, namely: "The court erred in not entering judgment against the defendant and in favor of the plaintiff on plaintiff's motion therefor, for want of a sufficient affidavit of defence."

EIGHTH. Said Circuit Court of Appeals erred in not giving in its opinion filed consideration to and sustaining the third assignment of error upon the record in said cause, namely: "The court erred in overruling plaintiff's motion (filed and made in open court on the calling of the case for jury trial and before the jury was called and sworn) for judgment against the defendant and in favor of the plaintiff, said motion having been based upon the following reasons appearing by defendant's purported affidavit of defence of record in the cause, to wit:

"(1) On the grounds that the defendant has admitted the material allegations of the statement of claim.

"(2) On the grounds that the material averments of a sufficient statement of claim are not denied.

"(3) On the grounds that the defendant has not set up new matter constituting a legal defence."

NINTH. Said Circuit Court of Appeals erred in not giving in its opinion filed consideration to and sustaining the fourth assignment of error upon the record in said cause, namely: "The court erred in its ruling made under the circumstances and in the manner, to wit, whereas at the trial the plaintiff offered in evidence, together as a whole, the plaintiff's statement of claim and the defendant's affidavit of defence, said offer being restricted by its terms to those parts that served to obviate, in the judgment of the use-plaintiff, the necessity of the plaintiff submitting to the jury other or further proof for establishing the truth of the allegations of fact constituting plaintiff's cause of action, as the same were set out in said statement and then remaining on file and as of record in said cause; and whereas the

trial Judge ruled in respect to said offer, that the statement of claim only was admitted in evidence and not the said affidavit of defence; and whereas the plaintiff then and there excepted to said ruling and was by said trial Judge allowed the same."

TENTH. Said Circuit Court of Appeals erred in not giving in its opinion filed consideration to and sustaining the fifth assignment of error upon the record in said cause, namely: "The court erred in refusing and omitting to charge the jury on plaintiff's points, duly submitted and reading as follows:

> "'1. If the jury finds from the evidence that the plaintiff's writ of summons, issued and served in his action in the United States Circuit Court at Boston, was made returnable to a return day established by the State laws of Massachusetts, the verdict must be for the plaintiff.
>
> "'2. If the jury finds from the evidence that the plaintiff ordered the court clerk at Boston, by writing, delivered to him on or before the return day named in the writ of summons, to enter the action on the docket of his office, the verdict must be for the plaintiff.
>
> "'3. If the jury finds from the evidence that the defendant in the Boston case had failed to enter his appearance in writing in the clerk's office within ten days after the return day named in the writ, and the plaintiff, in writing, delivered to him, ordered the court clerk to record such default, and the clerk failed and neglected to do so, the verdict must be for the plaintiff.
>
> "'4. If the jury finds that the defendant in the Boston case had failed to enter his appearance, and the plaintiff, on or after the expiration of fourteen days after the day named in the summons as the return day, ordered the court clerk, in writing delivered to him, to enter judgment for the plaintiff and against the defendant for default of appearance, the verdict must be for the plaintiff.

"'5. If the jury finds that the plaintiff ordered the court clerk at Boston, in writing delivered to him, to assess the plaintiff's damages in that case and he neglected and failed to do so, the verdict must be for the plaintiff.

"'6. If the jury finds that the plaintiff, on or not later than January 25, 1910, had ordered the court clerk at Boston, in writing delivered to him, to issue execution in his case, and he neglected and failed to do so, the verdict must be for the plaintiff.

"'7. Under the whole evidence in the case the plaintiff is entitled to recover, and the verdict must be for the plaintiff.'"

ELEVENTH. Said Circuit Court of Appeals erred in not giving in its opinion filed consideration to and sustaining the sixth assignment of error upon the record in said cause, namely: "The court erred in giving binding instructions to the jury to render its verdict for the defendant."

TWELFTH. Said Circuit Court of Appeals erred in not giving in its opinion filed consideration to and sustaining the seventh assignment of error upon the record in said cause, namely: "The court erred in not instructing the jury to render its verdict for the plaintiff."

(3.) BRIEF OF ARGUMENT.

The Circuit Court of Appeals, in affirming the judgment of the trial court adopts the language used by the trial Judge in giving his reasons for refusing a new trial.

It will be noticed that those reasons are based upon the assumption of a disregard, on the part of the use-plaintiff, of the court rules in the prosecution of his action in the Federal Circuit Court for the District of Massachusetts; that is to say, that the defendant's principal in the bond in suit, as clerk of the Federal Court *"contended the return days fixed by the rules of the Circuit Court governed,"* and that the use-plaintiff, as the plaintiff in that action, *"sought to have a default judgment entered in accordance with the return days fixed by the*

Massachusetts State Statutes for the courts of that State"; thus leaving it to be inferred that there was a material and fatal conflict between the practice of the two jurisdictions in respect to the return days for their respective process of the character employed in the use-plaintiff's action in the Federal Court. Now, it is to be much regretted that in neither of the opinions of the two courts below there appears an attempt to elucidate or point out specifically where such rules differed, if at all, or in what particulars there was a material conflict between them, if any such there were. The use-plaintiff denies there was such conflict.

In the brief of argument of the use-plaintiff filed in the Circuit Court of Appeals below there appears a paragraph reading as follows:

> "The learned trial Judge states in his opinion overruling motion for new trial: 'The Federal practice differed, and it is clear that the clerk was obeying the rules of the Circuit Court upon this subject,' Pray what specific rules and in what particulars does the Federal practice differ from the State practice? We are left without a basis for such a statement. The plaintiff-in-error challenges particulars. The learned Judge is wholly in error in such statement, both in fact and law."

The particulars so desired are not given simply because the facts upon which to base them are non-existent. There is no conflict in the practice between the two jurisdictions. It will be noticed by the record that the only contention made by the court clerk for not docketing the use-plaintiff's action, and his subsequent disobedience in not obeying the præcipes of the use-plaintiff to him therein, is set out in the affidavit of defence filed in the trial court, as follows (pp. 30, 31):

> "Deponent is informed, and believes and expects to be able to prove that the said writ and proceedings thereunder could not be entered upon the docket of said court by said Charles K. Darling, clerk of said court, until February 22, or 23, 1910, except by agreement of parties

or by a special order of the court, neither of which was obtained in the said action. That Rule 7 of the rules of said court provides as follows:

"APPEARANCES—ENTRY OF WRITS.

"'1. Each writ, bill in equity or other proceeding entered, shall be accompanied with an appearance as provided in Rule 5, and shall be forthwith docketed in the order in which received by the clerk, with the name of the person appearing; but no entry shall be held effective, and no docketing shall be made, until such writ, bill or other proceeding is returned and on file, except by special order of the court or a judge thereof.'

"'2. All actions by writ shall be entered within the first two days of the return term and not afterwards, unless by agreement of the parties or by special order of the court or a judge, and, in the latter case, or such additional notice to the defendant or defendants as the court or judge may order, to be served by the marshal or his deputy and due return made thereof.'"

It is submitted that such defence is not only frivolous, but is an affront to the intelligence of the court and a speculation upon the legal acumen of the prosecutor in the cause. It is extremely difficult to restrain one's language within the bounds that the dignity of the proceedings require in the framing of an argument against contending forces whose personnel places such a measure upon the intelligence of their adversary.

Manifestly, the defence based upon the rules above recited from the affidavit of defence, as well as the judicial upholding of the contention based upon same, are upon the assumption that the use-plantiff, who appears *pro se*, lacks the intelligence and legal acumen to discern the difference between a term period of court sessions and the period of the "return term" of court process; the tolerance upon the files of court

of such defence, it is submitted, is a degradation of the dignity of a court of jusice. What must be the feelings of a suitor who is turned out of court on the strength of such a defence?

It will be noticed, however, that so much of the recited court rule, alluded to, as does apply to the use-plaintiff's case, that is to say Section 1, in law convicts the clerk of court of a breach of his official bond here in suit, because he neglected and failed to docket the use-plaintiff's action until after action was commenced in this case in the court below (pp. 2, 33).

The rule of the Federal Court, of the District of Massachusetts, that does apply to the case in question is Rule 9 of that court (p. 48 of Transcript of Record), which adopts the practice of the State Courts for its common law cases, and the return days for process, such as was employed by the use-plaintiff in his said case, is therefore fixed by Section 24 of Chapter 167 of the Revised Laws of Massachusetts then in force, which section reads as follows (p. 16):

> "Section 24. The first Monday of every month shall be a return day in every county for writs, processes, notices to appear and citations in all actions, suits and other civil proceedngs in the Supreme Judicial Court and the Superior Court. Such writs, notices and citations and processes may be made returnable, at the election of the party who takes out the same, at any return day within three monhs after date thereof; but said court may make them returnable at other times."

It will be noticed that said Rule 9 reads as follows:

> *"State Laws Adopted in Common Law Causes.*
>
> "1. As authorized by Section 915, of the Revised Statutes, the court adopts in common law causes all State laws now, towit, this second day of February, 1903, in force in the Sate constituting this district, in relation to attachments and other process, subject to the proviso contained in said section; and such laws so adopted include all remedies by attachment, or other

process, against the property of defendants now, to wit, this second day of February, 1903, provided by the laws of said State, whether directly or by foreign attachment, trustee process or garnishment, or whether original or interlocutory."

Now, why did not the court below give considera.ion to these rules and elucidate their inapplicableness to the plaintiff proceedings if such in its judgment is the circumstances and the law in the case? Now, if in fact and in law the court clerk was obeying the rules of his court, why were not those rules specifically mentioned and the Rule 9, above set out, shown to be invalid, or inapplicable to the use-plaintiff's case in that court?

It is further alleged that the clerk of court in refusing to obey the præcipes of the use-plaintiff as the plaintiff in that case acted upon the instructions of the circuit judge of that court: pray, where is there provision for authorizing a judge of court to intervene in a case and give instructions therein in the absence of a notice to the parties and a hearing first had? Against alleged testimony of his honor, the said circuit judge, as a witness in the trial court below, testimony that was wholly negative in its character, as to his alleged knowledge, we cite rule nine of his court, above quoted, and also the judicial decision of his honor rendered in the name of his court in the case of *United Water Works Co. vs. Stone* (1906), 143 Fed. Rep. 1022, in dismissing a motion to revoke an interlocutory order allowing an attachment authorized by the State laws, where his honor said:

> "The practice of the State Court has been the practice of this court, *so far as occasion has arisen.* That practice will be followed until it has been held illegal."

Further, we invoke the judicial notice that is obligatory upon all judges of the United States Courts (Caha *vs.* U. S. 152, U. S. 211, 221; Bank *vs.* Francklyn, 120 U. S., 747, 751), as to what the court rules of the Circuit Court of the United States for the District of Massachusetts actually were

at the time (Oct. 14, 1909, p. 23) of the issue of the use-plaintiffs said writ in that court and ask their attention to the above quoted rule nine of that court in respect to its meaning and effect in the case of the use-plaintiffs cause of action here at bar as set out in his statement of claim (p. 5, Trans. Rec.).

It will be noticed that to have made the writ returnable to February 22d or 23d, 1910, as contended could only be done in the absence of an agreement of the parties or a special order of the court, would have made a void writ *ab nitio* because Section 24 of the State practice laws just quoted requires the return to be "at any return day within three months after date thereof." The writ was dated October 14, 1909, and February 22d, 1910, is over four months after the date of the writ; moreover, Section 11 of Chapter 173 of the Revised Laws of Massachusetts provides that if the plaintiff fails to enter his writ in the clerk's office on or before its return day the action may at any time, upon motion of the defendant, be dismissed with costs (p. 16). The return day named in the writ was the first Monday in December, 1909 (December 6th); over two months and a half prior to February 22, 1910. Even if it were true in point of fact and law that the plaintiff in that case had made a mistake or error in the time stated in the writ for the day of its return, which is denied to be the case, such circumstance would avail nothing to the defendants, because the error or mistake, if any in such particular there was, could be amended.

N. S. Rev. Stat. 948.

Rev. Laws, Mass. Chap. 173, Sec. 46 (p. 19 Trans. Rec).

Hamilton *vs.* Ingraham, 121 Mass., 562.

Hendrick *vs.* Whittlemore, 105 Mass., 23, 29.

Norton *et als. vs.* City of Dover, 14 Fed. Rep., 106.

It was not within the province of the court clerk to adjudge the writ or proceedings thereon erroneous or void and refuse performance of his official functions and thereby cause the plaintiff to lose the lien of his attachment acquired under the service of the writ made by the marshal. It was the

clerk's duty to leave all questions of supposed irregularity to the parties in the case. Even the court, under the circumstances of the case, could not have made a valid order quashing the writ or arresting the proceedings, had such been applied for by the defendants, because of the provisions of U. S. Rev. Stat., 954, as also Sec. 46, Chap. 173 of the Rev. Laws of Mass. (p. 19, trans. Rec.), then in force and effect. These provisions of law are mandatory and require implicit obedience as well from the court as its suitors; the court possesses no dispensing power in such cases.

It is submitted as a legal proposition for the consideration and decision of this court, and not to be evaded and ignored as has been done by the courts below in utter disregard of constitutional obligations, that the process service and return thereof shown by the record (p. 25), and not disputed (p. 29, etc.), gave the court complete jurisdiction over the property attached and the persons summoned therein, in that it was served, first, by attaching the defendant's property in the hands of its trustee, and, afterwards, by summons together with a copy of plaintiff's declaration *in personam* on the defendant within the district; and, therefore, established substantive rights of property upon the part of the plaintiff that the court is in duty bound to protect and enforce. Black. on Judgments, Section 224, says:

> "Although the service of process in an action may have been characterized by some defect or irregularity, it does not necessarily follow that the ensuing judgment will be void. For if the party would take advantage of such a matter, he must do so in the action itself by some proper motion or proceeding."

Freeman, on Judgments, Section 126, says:

> "From the moment of the service of process, the court has such control over the litigants that all subsequent proceedings, however erroneous, are not void. If there is any irregularity in the process, or in the manner of its service, the defendant must take advantage of

such irregularity by some motion or proceeding in the court where the action is pending. The fact that the defendant is not given all the time allowed by law to plead, * * * or any other fact * * * on account of which a judgment by default would be reversed upon appeal, will not ordinarily make the judgment vulnerable to a collateral attack. * * * The objects to be accomplished by process are to advise the defendant that an action or proceeding has been commenced against him by the plaintiff, and warn him that he must appear within a time and place named and make such defence as he has, and in default of his so doing, that judgment against him will be applied for or taken in a sum designated, or for relief specified. If the summons actually issued accomplished these purposes, it should be held sufficient to confer jurisdiction."

In *Hendrick vs. Whittlemore*, 105 Mass., 23, 29, the court said:

"Many considerations favor the rule that judgments of a court of competent jurisdiction which are erroneous by reason of defect of process, * * * can be impeached by parties thereto only by proceedings instituted directly for that purpose. The plaintiff is concluded by such judgment. His demand is merged in it. He cannot treat it as a nullity, and proceed again upon his original demand as if no such judgment had been rendered, * * * writs not in exact conformity to the statute forms, but defective * * * may be amended, if, by intendment of law, the effect is not changed, and the defendant is not misled thereby (citing authorities). The writ is merely the process by which the court gains jurisdiction of the person of the defendant."

In *Ammons vs. Brunswick, etc., Co.*, 141 Fed. Rep., 570, it was held:

"A summons duly served on a defendant, which notifies him of the court, term, time and place where he is re-

quired to appear and that he is required to answer the claim of plaintiff, is not fatally defective because it omits to state the penalty for his failure to appear as specified in the Statute; the defect being one of form and not of substance in no manner affected the substantive rights of the parties, and at most is an irregularity, a defect in form and not of substance. It showed the defendant that an action had been instituted against him and that he was required to answer it. This is a special office of a summons."

In *Barker Co. et al. vs. Central West Inv. Co.*, 105 N. W. Rep., 985, the summons was defective in form as to the date of return day and answer day, making each of these dates *one week earlier than the proper time*. A special appearance was entered and objection to jurisdiction made. The court in over-ruling the objection held the writ amendable, saying:

"The summons in this case was not void, but merely irregular, and, if no appearance had been made by defendant and a judgment rendered thereon, the judgment would be proof against collateral attack" (citing authorities).

In *Hendrick vs. Whittlemore*, 105 Mass., 23, the court said:

"The general principle is, that a domestic judgment of a court of common law jurisdiction, to which a writ of error will lie, is valid as between the parties, until reversed; *notwithstanding a failure to obtain, by proper process*, jurisdiction of the person of the party against whom it is rendered" (citing authorities).

In *Norton et als. vs. City of Dover*, 14 Fed. Rep., 106, the writs were, by mistake, made returnable on a Sunday, yet the court did not hold the writs void, but only voidable in proper proceedings taken to that end, as, for instance, by motion to quash, when leave would be given plaintiff to amend, if desired.

Now, it is submitted that the foregoing recited cases evidence the substantive right of the plaintiff in the case which

it is the duty of courts to protect and enforce. They show that, according to the principles of the common law, whether the summons was erroneous or not, the proceedings on it were valid until reversed or set aside by the court. The court clerk therefore could not adjudge the writ erroneous, nor could he take any advantage of such circumstance, if in fact and law such were the case, as he was no party to the action in which the writ was issued. Neither could the Circuit Judge interfere in the absence of a proper case being laid before him under oath by the defendant or its trustee. They both were informed by the marshal's return that due service was had of the writ on both of them, and it was their duty to apply to the court for relief from its mandate to appear and answer at the time and place named in the writ, or abide the consequences.

Now, these consequences could not lawfully be forestalled by the court clerk refusing to docket the case and otherwise failing to perform the functions of his office on the proper application of the plaintiff in the regular course of prosecuting his action.

The clerk of a court is essentially a ministerial officer (7 Cycl. Law and Pro., 196). And he has nothing to do with the character or purpose of papers which are tendered to him to be filed. When suit is ordered, or process directed to be issued, it is his duty to comply, if the party is *prima facie* entitled to it; and for failure to do so he is liable for any loss, the measure of this responsibility being the damages which have resulted therefrom (7 Cycl. Law and Pro., 228).

In *Thomson vs. Sleeper*, 168 Mass., 373, 376, we find a case in which the clerk of court refused to issue execution because he conceived some irregularity in the proceedings in which it was applied for, but he was held by mandamus to a performance of the requested service on the grounds that such questions were for the parties to raise and prosecute if they deemed them such, the court saying:

> "It is generally true that the duty of the clerk to issue an execution on a judgment is a ministerial duty which

he may be compelled to perform by mandamus, and for the non-performance or illegal performance of which he is liable to an action" (citing numerous authorities). See also:

Howard *vs.* U. S., 184 U. S., 676.

Boynton *vs.* Crockett, 69 Pac. Rep., 869.

In *Steel et al. vs. Thompson*, Admr., 62 Ala., 323, 327, in an action on a clerk's bond for refusing to issue execution, the court said:

"An execution in civil actions is the process by which the debt, or damages, or other thing recorded, and the costs adjudged, is obtained. * * * These writs it is the duty of the clerk to issue on application; and his failure is a breach of his official bond, which binds him to the performance of all the duties required of him by law."

It is submitted that the filing of the præcipes and motions by the use-plaintiff as the plaintiff in that case, with the court clerk for judgment on default of the person summoned as trustee (p. 27, Trans. Rec.), as also of the defendant therein (pp. 27, 28, Trans. Rec.), were, in fact, the rendition of judgments in both of those cases, as the law at once pronounced the judgment and the plaintiff's declaration on file expressed the amount of same, and it thereupon became the duty of the clerk of court to forthwith make the appropriate entries in the record books of his office; his duty in this respect was purely ministerial, and the law makes no provision for the intervention of anyone but the parties to the case, and they not having deemed it necessary to do so, it was of no concern to the court clerk as to the consequences of the parties involved; he was not a party to the proceedings, but he owed implicit obedience to the directions of those who were parties and concerned therein and provided him with their written orders for his warrant in executing same.

It is further submitted that the judgments and proceedings in that case, as had by the use-plaintiff as the plaintiff therein, as set out in the statement of claim in the suit here at

bar, are conclusive and binding on the defendants therein named until vacated or set aside by that court or by proceedings in error, and that until then they must be respected by all persons concerned, if the authority of law and the dignity and integrity of government are to be maintained.

In law those judgments took effect and remain in full force and effect from the dates of their respective renditions in the manner recited in the plaintiff's statement of claim, and not denied by the defence (p. 5, Trans. Rec.).

Parker *vs.* Rugg, 9 Gray (Mass.), 209.
King *vs.* Burnham, 129 Mass., 598.
Lapley *vs.* Goodsell, 122 Mass., 176.
Freemen on Judgments, Sec. 67.
Black on Judgments, Sec. 136.

In *Pierce vs. Lamper*, 141 Mass. 20, it was held that entries on the docket which it was the duty of the court clerk to have entered, even though he failed to do so, were to be deemed in law as actually entered.

Coming now to the question of damages, the action in this case being brought by a creditor-plaintiff and based upon the neglect and violation of duty on the part of a ministerial officer, it is submitted that the Circuit Court of Appeals below errs in holding that the burden of proof rested with the plaintiff to show that money could have been collected by an execution demand on the trustee against whom a default judgment had been entered for the full amount of the claim named in the attachment process duly served upon it (p. 27, Trans. Rec.).

Sedgwick on Damages, Vol. 2, Sec. 545, 546 (1891 edition), says:

> "It is settled as a general rule that the measure of damages in suits against ministerial officers for neglect or violation of duty, by a creditor-plaintiff, whose remedy against the debtor has been impaired by the neglect or other misconduct of the officer, is the actual injury sustained, this actual injury being measured by the amount

of the original debt due the plaintiff, or the value of the property which has been lost or prejudiced by the neglect of the officer, unless it is shown that the plaintiff's actual loss was less; * * * and that the law, proceeding on a principle of evidence, throws the burden of proof on the negligent party and assumes that the plaintiff is injured, as set out in his proceedings until the contrary appears."

Sutherland on Damages, Vol. 2, p. 1336 (1903 edition), says:

"For neglecting to issue an execution, the damages are *prima facie* the amount of the judgment."

In *Baltimore & Ohio R. Co. vs. Weeden*, 78 Fed. Rep., 584, before the Hon. Wm. H. Taft, now President of the United States, and the Hon. Horace H. Lurton, now Associate Justice of this honorable Supreme Court of the United States, then United States Circuit Judges of the Sixth Circuit, it was unanimously agreed by the court, in reversing the court below, in an action brought against the court clerk for having neglected and failing to issue a writ of error, that the measure of damages are *prima facie* the amount of the judgment in the case, with interest and costs, the court, speaking through the Honorable Judge Taft, saying:

"We now come to the question of damages. Upon this point we are all agreed: It is a rule in actions for negligence in issuing execution on a judgment * * * that the amount of the injury is *prima facie* measured by the face of the judgment, and the burden is on the negligent officer to reduce the recovery by showing the insolvency of the debtor. As against a public officer who negligently deprives another of his right to be heard in a suit against him, we think the same rule of evidence should prevail, and that the plaintiff should be entitled to recover all that the negligence of the defendant has caused him to pay, unless the officer can show that, even if he had not been negligent, the complaining litigant would have had ultimately to pay the same amount,

* * * in such case the defendant may introduce evidence in mitigation of damages."

In *Young vs. Hosmer*, 11 Mass., 89, it was held that the writ and judgment were sufficient *prima facie* evidence of the debt, and that the judgment to the whole amount of it is to be presumed lost by the negligence of the officer, the court adding:

> "The defendant might have repelled this presumption, and reduced the damages. But the evidence for this purpose must be suggested and produced on his part."

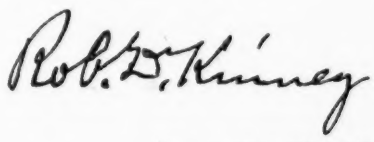
In *Comm. vs. Conter*, 18 Penna., 439, 446, in an action on a sheriff's bond for neglect in executing a *fieri facias*, whereby the lien of a levy was lost, and judgment having been recovered, on the question of damages the defendant was held *prima facie* liable for the whole amount endorsed on the execution in the absence of evidence to show that by no diligence could he have collected so much, the court citing:

> *Weld vs. Bartlett*, 10 Mass., 470, 474.
> *Bank of Rome vs. Curtiss*, 1 N. Y. (Hill), 275, 276.

In *Fielding vs. Waterhouse*, 40 N. Y. Superior Court, 424, a judgment against a debtor was wrongfully discharged and there was no proof as to its value, and the court held that it was to be presumed to be of the face value, the court saying:

> "It is right to apply the general rule of damages that when the amount is made incapable of estimation by the act of the wrongdoer, he must be made responsible for the value it may by reasonable possibility turn out to be of."

Respectfully submitted,



Pro se, Use-Plaintiff,
for Plaintiff in Error.

NO. 664 OCTOBER TERM, 1911

IN THE

Supreme Court of the United States

THE UNITED STATES OF AMERICA at the relation and to the use of ROBERT D. KIENRY

Plaintiff in Error

vs.

THE UNITED STATES FIDELITY & GUARANTY COMPANY

In Error to the United States Circuit Court of Appeals for the Third Circuit

Motion to Dismiss and to Affirm

THOMAS STOKES
BAYARD HENRY
Attorneys for Defendant in Error

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IN THE

Supreme Court of the United States

October Term, 1911. No. 664

THE UNITED STATES OF AMERICA AT THE RELATION AND TO THE USE OF ROBERT D. KINNEY
Plaintiff in Error

VS.

THE UNITED STATES FIDELITY & GUARANTY COMPANY
Defendant in Error

MOTION TO DISMISS AND TO AFFIRM

Now comes the United States Fidelity & Guaranty Company, the defendant in error, by Bayard Henry, its attorney, and moves this Court to dismiss the writ of error herein for irregularities and defects in the record which make it impossible to consider the case upon its merits and for the reasons stated in the accompanying argument; and the said defendant in error also moves this Court to affirm the judgments of the Circuit Court of Appeals and of the Circuit Court herein for the reason that the question upon which it is claimed that the jurisdiction depends is so frivolous as not to need further argument.

BAYARD HENRY
Attorney for Defendant in Error

NOTICE OF SUBMISSION OF MOTIONS TO DISMISS AND TO AFFIRM

Sir:

Please take notice that on all the papers and proceedings herein, I shall submit to the Supreme Court of the United States, at a stated term thereof, on Monday, November twenty-seventh, 1911, at the Capitol in the City of Washington, D. C., at the opening of the court on that day or as soon thereafter as possible, the motions of which the foregoing are copies; and that I shall submit with said motions and in support of the same the accompanying brief of argument.

Yours very truly,

BAYARD HENRY
Attorney for Defendant in Error
1438 Land Title Building
Philadelphia

To
ROBERT D. KINNEY, ESQ.,
815 North 42nd Street,
Philadelphia.

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vs.

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In Error to the United States Circuit Court of Appeals for the Third Circuit

Brief of Defendant in Error on Motion to Dismiss and to Affirm

THOMAS STOKES
BAYARD HENRY
Attorneys for Defendant in Error

IN THE

Supreme Court of the United States

October Term, 1911. No. 664

THE UNITED STATES OF AMERICA AT THE RELATION AND TO THE USE OF ROBERT D. KINNEY
Plaintiff in Error

VS.

THE UNITED STATES FIDELITY & GUARANTY COMPANY

BRIEF OF DEFENDANT IN ERROR ON MOTION TO DISMISS AND TO AFFIRM

The plaintiff in error, Robert D. Kinney, brought suit against the United States Fidelity & Guaranty Company, the defendant in error, in the Circuit Court of the United States for the Eastern District of Pennsylvania. The defendant was sued in its capacity as surety upon the official bond of Charles K. Darling, clerk of the Circuit Court of the United States for the District of Massachusetts. The plaintiff alleged a breach of the bond by the failure of the clerk to enter judgment by default and issue execution in a suit brought by the plaintiff against certain others in the

Circuit Court for the District of Massachusetts. The defendant denied the breach of the bond and denied that plaintiff had suffered any damages. Issue was joined and the case was tried before a jury. Both sides introduced testimony. At the close of the case the trial Judge instructed the jury to render its verdict for the defendant. Upon the verdict so rendered judgment was entered in favor of the defendant. The plaintiff did not embody the evidence taken during the trial nor the charge of the trial Judge into the record by bill of exceptions or otherwise. He then took an appeal to the Circuit Court of Appeals for the Third Circuit. That court went beyond the record and examined a copy of the stenographer's notes of testimony taken during the trial; finding no error it affirmed the judgment. The plaintiff then took this writ of error.

THIS COURT WILL BE UNABLE TO CONSIDER THE CASE UPON ITS MERITS BECAUSE NONE OF THE EVIDENCE GIVEN AT THE TRIAL NOR THE CHARGE OF THE COURT HAS BEEN MADE A PART OF THE RECORD.

After the trial of the cause and the entry of a verdict for the defendant, the plaintiff instead of embodying the evidence and the charge in a bill of exceptions, has placed in the record an "Extract from Minutes of October 20, 1910." (Record page 37.) This extract shows that on the date mentioned a jury was empannelled, the case was tried, the court instructed the jury to find for the defendant, and the jury so found. It results from this extraordinary procedure on the part of the plaintiff in error that although the entire record has been brought up, this court has none of the evidence before it. The plaintiff in error has made a fatal mistake. If he was aggrieved by the verdict he should have drawn up his bill of exceptions containing the evidence and had it sealed by the trial Judge. Having failed to do this, his assignments of error, all but three of which

relate to alleged errors committed at the trial, cannot be considered, for in the absence of the evidence upon the strength of which the Circuit Court instructed the jury to enter a verdict for the defendant, it is impossible for an appellate court to determine whether or not reversible error was committed.

If any authorities in support of our contention are necessary, we submit the following:

In *Suydam vs. Williamson*, 20 Howard 427 (1857), this court in an opinion by Mr. Justice CLIFFORD said (page 433):

"When a party is dissatisfied with the decision of his cause in an inferior court and intends to seek a revision of the law applied to the case in a superior jurisdiction, he must take care to raise the questions of law to be revised, and put the facts on the record for the information of the appellate tribunal; and if he omits to do so in any of the methods known to the practice of such courts, he must be content to abide the consequences of his own neglect. Evidence, whether written or oral, and whether given to the court or to the jury, does not become a part of the record, unless made so by some regular proceeding at the time of the trial and before the rendition of the judgment. Whatever the error may be, and in whatever stage of the cause it may have occurred, it must appear in the record, else it cannot be revised in a court of error exercising jurisdiction according to the course of the common law."

In *Hanna vs. Maas*, 122 U. S. 24 (1886), the bill of exceptions was irregular; in referring to it the court says (page 26):

"The object of a bill of exceptions is to put on record rulings and instructions in matter of law which could not otherwise be a subject of revision in a court of error. The excepting party, in order to entitle himself to such revision,

must not only allege exceptions at the trial or hearing, but he must afterwards draw up and hand to the presiding judge those exceptions in writing, stating distinctly and specifically the rulings or instructions of which he complains."

The court accordingly concluded that the defendants having failed to reduce their exceptions to such a form that the court could pass upon them, the judgment must be affirmed.

And in *Bank of New Orleans vs. Caldwell*, 154 U. S. 592 (1873) where it appeared that no bill of exceptions had been taken during the progress of the trial, the Supreme Court ordered the judgment affirmed without an opinion.

To the same effect are:

Michigan Insurance Bank vs. Eldred, 143 U. S. 293, 298 (1891).

Lee Won Jeong vs. United States, 145 Federal Reporter, 512 (1906).

Rodgers vs. United States, 152 Federal Reporter, 426 (1907).

Reader vs. Haggin, 160 Federal Reporter, 909 (1908).

The only assignments of error that do not necessitate a reference to the evidence are the sixth, seventh and eighth. These assignments relate to interlocutory decisions of the Circuit Court in refusing to enter a summary judgment in favor of the plaintiff for want of a sufficient affidavit of defence, and again on the plaintiff's motion for judgment on the day of the trial before the jury had been sworn. Under the Pennsylvania Practice Act of May 25, 1887 (Pamphlet Laws, page 271), now in force in that state, the affidavit of defence is not a pleading, and its purpose is merely to show a defence sufficient to prevent a summary judgment; when this purpose has been accom-

plished it has performed its whole duty. It does not in any way limit the defence to be made at the trial, and in the present case a complete defence may have been proved at the trial, so far as the court can tell in the absence of the evidence, although not even suggested in the affidavit of defence. *Flegal vs. Hoover*, 156 Pa. 276, 281 (1893). Moreover, in no event could the trial Judge have entered a judgment for the plaintiff upon the latter's motion before the jury was sworn; the plaintiff's action was assumpsit (Record page 1), and the defendant had filed a plea of non assumpsit (Record page 35), which under the Pennsylvania Practice Act above referred to, is the plea of the general issue, so that an issue had been joined between the parties requiring a trial by jury to determine.

The Circuit Court of Appeals was without jurisdiction to review by writ of error these interlocutory orders refusing summary judgments. *Shumaker vs. Security Life and Annuity Company*, 159 Federal Reporter, 112 (1908). In addition even if these interlocutory orders had been erroneous they would not constitute reversible error, for after they were made the plaintiff proceeded to trial where evidence was offered to the jury on behalf of both parties, and the plaintiff received a full and fair trial. After a verdict of the jury has been rendered the plaintiff cannot complain because the Court did not give him judgment for want of a sufficient affidavit of defence. Such a verdict of necessity cures any defect which might have existed in the affidavit of defence, though in fact there was none.

It is therefore respectfully submitted that the writ of error should be dismissed or the judgment of the Circuit Court of Appeals for the Third Circuit should be affirmed.

THOMAS STOKES
BAYARD HENRY
Attorneys for Defendant in Error

UNITED STATES AT THE RELATION OF KINNEY *v.* UNITED STATES FIDELITY AND GUARANTY COMPANY.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 664. Motion to dismiss or affirm. Submitted December 4, 1911.—Decided December 18, 1911.

Where the effect of the denial of plaintiff's motion for judgment is simply to postpone consideration of the subject until the trial, plaintiff's interests are not prejudiced and there cannot be reversible error.

Occurrences at the trial cannot be considered if the record contains no bill of exceptions.

A paper in the record signed by the plaintiff is not a bill of exceptions although styled exceptions to charge of jury and purporting to be initialed by the trial judge. *Origet* v. *United States*, 125 U. S. 243.

Even if a part of the record were treated as a bill of exceptions if all matters therein depend for their solution upon examination of evidence not in the record, this court will affirm, not having any means for determining whether reversible error arose from the action of the court.

186 Fed. Rep. 477, affirmed.

THE facts are stated in the opinion.

Mr. Thomas Stokes and *Mr. Bayard Henry*, for defendant in error in support of the motion.

Mr. Robert D. Kinney, relator in *propria persona*, in opposition thereto.

Memorandum opinion by direction of the court. By MR. CHIEF JUSTICE WHITE.

The trial court instructed a verdict for the defendant,

and the court below affirmed its action. The suit was to recover upon the bond of a Clerk of a Circuit Court. 186 Fed. Rep. 477. We think a motion to affirm must prevail.

All the errors relied upon complain of a refusal to grant a motion of the plaintiff for judgment because of the insufficiency of "an affidavit of defense" and of various rulings made at the trial. Although the motion for judgment was denied, its merits were not passed upon, since the effect of the ruling was simply to postpone consideration of the subject until the trial, and therefore the exception which was formally allowed was simply "to the refusal by the court to decide the issue of law raised by plaintiff's motion for judgment," etc. But afterwards the defendant filed formal pleas to the statement of plaintiff's claim and joined issue thereon. As the ruling left it open to raise the question presented by the motion, it follows that the mere order of postponement did not prejudice and cannot possibly constitute reversible error. As to the contentions which relate to occurrences at the trial, they cannot be considered, as the record contains no bill of exceptions. The paper in the record styled "Exceptions to the charge to jury," initialed "J. B. McP., trial judge," and signed by the plaintiff, is not a bill of exceptions (*Origet* v. *United States*, 125 U. S. 240, 243), but if it were to be treated as a bill of exceptions, as all the matters therein referred to depend for their solution upon an examination of the evidence which is not in the record, it follows that we have no means of determining whether reversible error arose from an action of the court on any of the subjects to which the paper refers. This being the case, it becomes our duty to affirm.

Affirmed.